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**MASSACHUSETTS REPORTS**  
**142**

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**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MASSACHUSETTS**

**MAY 1886 — OCTOBER 1886**

**JOHN LATHROP**  
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**JUDGES**  
**OF THE**  
**SUPREME JUDICIAL COURT**

**DURING THE TIME OF THESE REPORTS.**

**HON. MARCUS MORTON, CHIEF JUSTICE.**

**HON. WALBRIDGE A. FIELD.**

**HON. CHARLES DEVENS.**

**HON. WILLIAM ALLEN.**

**HON. CHARLES ALLEN.**

**HON. OLIVER WENDELL HOLMES, JR.**

**HON. WILLIAM S. GARDNER.**

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**ATTORNEY GENERAL.**

**HON. EDGAR J. SHERMAN.**





# TABLE

## OF THE CASES REPORTED.

Abbott <i>v.</i> Shepard . . . . .	17	Case (Haley <i>v.</i> ) . . . . .	316
Andrews <i>v.</i> Cassidy . . . . .	96	Cassidy (Andrews <i>v.</i> ) . . . . .	96
Atkins <i>v.</i> Merrick Thread Co. . . . .	431	Caverly <i>v.</i> Eastman . . . . .	4
—— <i>v.</i> Witherell . . . . .	482	Chadwick (Commonwealth <i>v.</i> ) . . . . .	595
Attorney General <i>v.</i> Boston . . . . .	200	Chaffee <i>v.</i> Blaisdell . . . . .	538
—— <i>v.</i> Brigham . . . . .	248	Chapin <i>v.</i> Freeland . . . . .	383
—— <i>v.</i> Consumers' Gas Co. . . . .	417	Cheney Bigelow Wire Works	
—— <i>v.</i> Fitchburg Railroad . . . . .	40	<i>v.</i> Sorrell . . . . .	442
Bank of America <i>v.</i> Shaw . . . . .	290	Chesman <i>v.</i> Cummings . . . . .	65
Bates <i>v.</i> Youngerman . . . . .	120	Church <i>v.</i> Fowle . . . . .	12
Baxter <i>v.</i> Doe . . . . .	558	—— (Kites <i>v.</i> ) . . . . .	586
Bigelow (Brooks <i>v.</i> ) . . . . .	6	Citizens' National Bank <i>v.</i> Old-	
Bill (Shattuck <i>v.</i> ) . . . . .	56	ham . . . . .	379
Blaisdell (Chaffee <i>v.</i> ) . . . . .	538	Clark (Peck <i>v.</i> ) . . . . .	436
Boston (Attorney General <i>v.</i> ) . . . . .	200	Coburn <i>v.</i> Middlesex Co. . . . .	264
—— (Massachusetts Society		Cochrane <i>v.</i> Rich . . . . .	15
for the Prevention of Cruelty		Collins <i>v.</i> South Boston Rail-	
to Animals <i>v.</i> ) . . . . .	24	road . . . . .	301
—— (Minot <i>v.</i> ) . . . . .	274	Comins <i>v.</i> Turner's Falls Co. . . . .	443
Boston & Albany Railroad		Commercial Assur. Co. (Eliot	
(Commonwealth <i>v.</i> ) . . . . .	146	Five Cents Savings Bank <i>v.</i> ) . . . . .	142
—— (Keefe <i>v.</i> ) . . . . .	251	Commonwealth <i>v.</i> Boston &	
—— (Wright <i>v.</i> ) . . . . .	296	Albany Railroad . . . . .	146
Boston Board of Police (Ham		<i>v.</i> Briant . . . . .	463
<i>v.</i> ) . . . . .	90	<i>v.</i> Chadwick . . . . .	595
Boston Safe Deposit & Trust		<i>v.</i> Hall . . . . .	454
Co. <i>v.</i> Plummer . . . . .	257	<i>v.</i> Intoxicating Liquors . . . . .	470
Briant (Commonwealth <i>v.</i> ) . . . . .	463	<i>v.</i> Jones . . . . .	573
Brickett <i>v.</i> Haverhill Aque-		<i>v.</i> Lynes . . . . .	577
duct . . . . .	394	<i>v.</i> Mandeville . . . . .	469
Brigham (Attorney General		<i>v.</i> Molter . . . . .	533
<i>v.</i> ) . . . . .	248	<i>v.</i> Richardson . . . . .	71
Brooks <i>v.</i> Bigelow . . . . .	6	<i>v.</i> Rooney . . . . .	474
—— <i>v.</i> Whitmore . . . . .	399	<i>v.</i> Sawyer . . . . .	530
Brown (Traders & Mechanics'		<i>v.</i> Stevens . . . . .	457
Ins. Co. <i>v.</i> ) . . . . .	403	<i>v.</i> Stevenson . . . . .	466
Butler (Cunningham <i>v.</i> ) . . . . .	47	<i>v.</i> Welch . . . . .	473
		<i>v.</i> Wood . . . . .	459

Connelly (Fuller v.) . . . . .	227	Hayden v. Hayden . . . . .	448
Consumers' Gas Co. (Attorney General v.) . . . . .	417	Hibbard (McKim v.) . . . . .	422
— (Kenney v.) . . . . .	417	Holden (Rogers v.) . . . . .	196
Crandall (Rich v.) . . . . .	117	Holmes v. Turner's Falls Co. . . . .	590
Cummings (Chesman v.) . . . . .	65	Hudson (Flagg v.) . . . . .	280
Cumnock v. Institution for Savings in Newburyport . . . . .	342	Hyman (Faulkner v.) . . . . .	53
Cunningham v. Butler . . . . .	47	Indian Orchard Mills (Rock v.) . . . . .	522
Curley (Morgan v.) . . . . .	107	Institution for Savings in Newburyport (Cumnock v.) . . . . .	342
Delano v. Smith . . . . .	490	Intoxicating Liquors (Commonwealth v.) . . . . .	470
Doe (Baxter v.) . . . . .	558	James v. Newton . . . . .	366
— (Laurell v.) . . . . .	558	Jenks (Stone v.) . . . . .	519
— (Newman v.) . . . . .	558	Jones (Commonwealth v.) . . . . .	573
Dole v. Wooldredge . . . . .	161	— v. Dow . . . . .	130
Dow (Jones v.) . . . . .	130	Keefe v. Boston & Albany Railroad . . . . .	251
Dunham (Kent v.) . . . . .	216	Kellogg v. Kimball . . . . .	124
Eastern Railroad (Gould v.) . . . . .	85	— v. Thompson . . . . .	76
Easthampton (Fortin v.) . . . . .	486	Kennebec Framing Co. v. Pickering . . . . .	80
Eastman (Caverly v.) . . . . .	4	Kennedy v. Saunders . . . . .	9
Eliot Five Cents Savings Bank v. Commercial Assur. Co. . . . .	142	Kenney v. Consumers' Gas Co. . . . .	417
Elsey v. Odd Fellows' Mutual Relief Association . . . . .	224	Kent v. Dunham . . . . .	216
English (Nickerson v.) . . . . .	267	Kimball (Kellogg v.) . . . . .	124
Faulkner v. Hyman . . . . .	53	King (Gaylord v.) . . . . .	495
Fitchburg Railroad (Attorney General v.) . . . . .	40	Kites v. Church . . . . .	586
Fitzgerald v. Libby . . . . .	235	Langdon v. Stewart . . . . .	576
Flagg v. Hudson . . . . .	280	Lathrop (Nash v.) . . . . .	29
Fortin v. Easthampton . . . . .	486	Laurell v. Doe . . . . .	558
Fowle (Church v.) . . . . .	12	Libby (Fitzgerald v.) . . . . .	235
Freeland (Chapin v.) . . . . .	383	— v. Norris . . . . .	246
Freeman v. Freeman . . . . .	98	Linden Spring Co. (New Haven Horse Nail Co. v.) . . . . .	349
Frissell (Phoenix Ins. Co. v.) . . . . .	513	Lindsey v. Parker . . . . .	582
Fuller v. Connelly . . . . .	227	Lowell (Webster v.) . . . . .	324
Gaylord v. King . . . . .	495	Lynes (Commonwealth v.) . . . . .	577
Gould v. Eastern Railroad . . . . .	85	McDonnell (Tansey v.) . . . . .	220
Granger v. Parker . . . . .	186	McGivney v. McGivney . . . . .	156
Haley v. Case . . . . .	316	McKim v. Hibbard . . . . .	422
Hall (Commonwealth v.) . . . . .	454	Mandeville (Commonwealth v.) . . . . .	469
— v. Hartwell . . . . .	447	Massachusetts Society for the Prevention of Cruelty to Animals v. Boston . . . . .	24
Ham v. Boston Board of Police . . . . .	90	Merrick Thread Co. (Atkins v.) . . . . .	431
Hartwell (Hall v.) . . . . .	447	Middlesex Co. (Coburn v.) . . . . .	264
Hastings v. Weber . . . . .	232		
Haverhill Aqueduct (Brickett v.) . . . . .	394		

Miles (Stevens v.) . . . . .	571	Quincy Savings Bank v. Tansey 220
Miller v. Shay . . . . .	598	
Minot v. Boston . . . . .	274	Rand (Shattuck v.) . . . . . 83
Molter (Commonwealth v.) . . . . .	583	Raymond (Weil v.) . . . . . 206
Morgan v. Curley . . . . .	107	Rich v. Crandall . . . . . 117
Morrill v. Phillips . . . . .	240	——— (Cochrane v.) . . . . . 15
Morrison v. Morrison . . . . .	361	——— (Willett v.) . . . . . 356
Morse (Nutt v.) . . . . .	1	Richardson (Commonwealth v.) 71
		Richmond Iron Works v. Wad-
		hams . . . . . 569
Nash v. Lathrop . . . . .	29	Rock v. Indian Orchard Mills . 522
Newburyport Institution for		Rogers v. Holden . . . . . 196
Savings (Cumnock v.) . . . . .	84	Rooney (Commonwealth v.) . 474
New Haven Horse Nail Co. v.		
Linden Spring Co. . . . .	349	Safford v. Weare . . . . . 231
Newman v. Doe . . . . .	558	Sampson Manuf. Co. (Nott v.) 479
Newton (James v.) . . . . .	366	Saunders (Kennedy v.) . . . . . 9
——— (Stanchfield v.) . . . . .	110	Sawtell (Place v.) . . . . . 477
New York & New England		Sawyer (Commonwealth v.) . 530
Railroad (Smith v.) . . . . .	21	Shattuck v. Bill . . . . . 56
Nickerson v. English . . . . .	267	——— v. Rand . . . . . 83
Norris (Libby v.) . . . . .	246	Shaw (Bank of America v.) . 290
Northborough v. Wood . . . . .	551	Shay (Miller v.) . . . . . 598
Norton (Nutt v.) . . . . .	242	Shepard (Abbott v.) . . . . . 17
——— v. Palmer . . . . .	433	——— (Sherburne v.) . . . . . 141
Nott v. Sampson Manuf. Co. . 479		Sherburne v. Shepard . . . . . 141
Nutt v. Morse . . . . .	1	Shoe & Leather National Bank
——— v. Norton . . . . .	242	v. Wood . . . . . 563
		Smith (Delano v.) . . . . . 490
		——— v. New York & New
		England Railroad . . . . . 21
		——— (O'Donnell v.) . . . . . 505
		——— (Talcott v.) . . . . . 542
		Sorrell (Cheney Bigelow Wire
		Works v.) . . . . . 442
		South Boston Railroad (Collins
		v.) . . . . . 301
		Stanchfield v. Newton . . . . . 110
		Standard Measuring Machine
		Co. (Porter v.) . . . . . 191
		Stevens (Commonwealth v.) . 457
		——— v. Miles . . . . . 571
		Stevenson (Commonwealth v.) 466
		Stewart (Langdon v.) . . . . . 576
		Stoddard (Taft v.) . . . . . 545
		Stone v. Jenks . . . . . 519
		Taft v. Stoddard . . . . . 545
		Talcott v. Smith . . . . . 542
		Tansey v. McDonnell . . . . . 220
		——— (Quincy Savings Bank
		v.) . . . . . 220

Tompson (Kellogg v.) . . .	76	Whitmore (Brooks v.) . . .	399
Traders & Mechanics' Ins. Co. v. Brown . . . . .	408	Willett v. Rich . . . . .	356
Turner's Falls Co. (Comins v.)	448	Williams v. Williams . . .	515
—— (Holmes v.) . . . .	590	Witherell (Atkins v.) . . .	482
Wadhams (Richmond Iron Works v.) . . . . .	569	Wood (Commonwealth v.) . .	459
Weare (Safford v.) . . . .	231	—— (Northborough v.) . . .	551
Weber (Hastings v.) . . . .	232	—— (Shoe & Leather Na- tional Bank v.) . . . . .	563
Webster v. Lowell . . . .	324	Woodsum (Odewald v.) . . .	512
Weil v. Raymond . . . . .	206	Wooldredge (Dole v.) . . .	161
Welch (Commonwealth v.) .	473	Worcester (Olson v.) . . .	536
Wells v. White . . . . .	518	Wright v. Boston & Albany Railroad . . . . .	296
White (Wells v.) . . . . .	518	Youngerman (Bates v.) . . .	120

# TABLE OF CASES

CITED BY THE COURT.

<i>Adams v. Cuddy</i> , 18 Pick. 460	239	<i>Bassett v. Daniels</i> , 136 Mass. 547	484
— <i>v. Frye</i> , 8 Met. 103	15	<i>Beadle v. Hunter</i> , 3 Strob. 331	391
— <i>v. Mills</i> , 126 Mass. 278	577	<i>Bearce v. Bowker</i> , 115 Mass. 129	198
<i>Addison v. Cox</i> , L. R. 8 Ch. 76	378	<i>Beers v. Jackman</i> , 108 Mass. 192	512
<i>Aldrich v. Boston &amp; Worcester Railroad</i> , 100 Mass. 31	368	<i>Belding v. Manly</i> , 21 Vt. 550	434
<i>Alexander v. Mills</i> , L. R. 6 Ch. 124	67	<i>Bemis v. Arlington</i> , 114 Mass. 507	289
<i>Alison, In re</i> , 11 Ch. D. 284	390	<i>Bentley v. Whittemore</i> , 4 C. E. Green, 462	52
<i>Allis v. Morton</i> , 4 Gray, 63	511	<i>Berkshire Glass Co. v. Wolcott</i> , 2 Allen, 227	198
<i>American Railway-Frog Co. v. Haven</i> , 101 Mass. 398	155	<i>Bernard v. Chiles</i> , 7 Dana, 18	391
<i>Andover &amp; Medford Turnpike v. Gould</i> , 6 Mass. 40	354	<i>Berridge v. Ward</i> , 10 C. B. (N. S.) 400	89
— <i>v. Hay</i> , 7 Mass. 102	354	<i>Birmingham v. Gallagher</i> , 112 Mass. 190	248
<i>Arnold v. Stevens</i> , 24 Pick. 106	24	<i>Blackstone Manuf. Co. v. Blackstone</i> , 18 Gray, 488	353
<i>Ashworth v. Stanwix</i> , 3 El. & El. 701	321	<i>Bliss v. Nichols</i> , 12 Allen, 443	294
<i>Atkins v. Bordman</i> , 20 Pick. 291	23	<i>Blodgett v. Hildreth</i> , 103 Mass. 484	510
— <i>v. —</i> 2 Met. 457	23	— <i>v. Moore</i> , 141 Mass. 75	245
<i>Atlas Engine Works v. Randall</i> , 100 Ind. 293	328	<i>Bonsey v. Amee</i> , 8 Pick. 236	78
<i>Attorney General v. Bay State Brick Co.</i> 115 Mass. 481	421	<i>Boston v. Richardson</i> , 13 Allen, 146	592
— <i>v. Bucknall</i> , 2 Atk. 328	218	<i>Bourne v. Cabot</i> , 3 Met. 305	374
— <i>v. Cambridge Consumers' Gas Co.</i> L. R. 4 Ch. 71	420	<i>Bowen v. South Building</i> , 137 Mass. 274	588
— <i>v. Jamaica Pond Aqueduct</i> , 133 Mass. 361	419	<i>Bower v. Hadden Blue Stone Co.</i> 3 Stew. (N. J.) 171	378
— <i>v. Metropolitan Railroad</i> , 125 Mass. 515	420	<i>Bowlin v. Nye</i> , 10 Cush. 416	348
— <i>v. Northumberland</i> , 7 Ch. D. 745	218	<i>Boynton v. Rees</i> , 8 Pick. 329	510
— <i>v. Price</i> , 17 Ves. 371	218	<i>Brabrook v. Boston Five Cents Savings Bank</i> , 104 Mass. 228	453
— <i>v. Sheffield Gas Consumers' Co.</i> 3 DeG., M. & G. 804	420	<i>Brady v. Blackinton</i> , 113 Mass. 238	486
<i>Badger v. Jones</i> , 12 Pick. 371	77	<i>Brainard v. Boston &amp; New York Central Railroad</i> , 12 Gray, 407	592
<i>Badlam v. Tucker</i> , 1 Pick. 389	16	<i>Bragg v. Danielson</i> , 141 Mass. 195	557
<i>Bagby v. Atlantic, Mississippi, &amp; Ohio Railroad</i> , 86 Penn. St. 291	52	<i>Brattle Square Church v. Grant</i> , 3 Gray, 142	217
<i>Bailey v. Bailey</i> , 97 Mass. 373	116	<i>Breen v. Seward</i> , 11 Gray, 118	549
<i>Bakeman v. Pooler</i> , 15 Wend. 637	345	<i>Bresnihan v. Sheehan</i> , 125 Mass. 11	158
<i>Baker v. Chase</i> , 55 N. H. 61	386	<i>Brice v. Bannister</i> , 3 Q. B. D. 569	378
<i>Baldwin v. Dow</i> , 130 Mass. 416	139	<i>Brigham v. Palmer</i> , 3 Allen, 450	197
<i>Banks v. Manchester</i> , 23 Fed. Rep. 143	89	<i>Brown v. Brown</i> , 8 El. & Bl. 876	517
— <i>v. West Publishing Co.</i> 27 Fed. Rep. 50	39	— <i>v. De Tastet, Jac.</i> 284	106
		— <i>v. Jackson</i> , 3 Wheat. 449	239
		— <i>v. Parker</i> , 28 Wis. 21	390
		— <i>v. Smith</i> , 116 Mass. 108	591
		<i>Bryan v. Weems</i> , 29 Ala. 423	391
		<i>Bryant v. Russell</i> , 23 Pick. 508	248

Buffum v. Tilton, 17 Pick. 510	215	Commonwealth v. Hurley, 99 Mass. 433	538
Bulger v. Roche, 11 Pick. 36	390	— v. Intoxicating Liquors, 105 Mass. 181	473
Burgess v. Keyes, 108 Mass. 43	251	— v. Kennedy, 136 Mass. 152	533
Burke v. Miller, 7 Cush. 547	183	— v. Kerrissey, 141 Mass. 110	476
Burlock v. Taylor, 16 Pick. 385	52	— v. Keyes, 11 Gray, 323	184
Burns v. Burns, 4 S. & R. 296	517	— v. Leighton, 140 Mass. 305	598
Butler v. Knight, L. R. 2 Ex. 109	63	— v. Logan, 12 Gray, 186	476
— v. Page, 7 Met. 40	478	— v. Mead, 140 Mass. 300	598
Butts v. Andrews, 136 Mass. 221	68	— v. Metropolitan Railroad, 107 Mass. 236	812
Byington v. Simpson, 134 Mass. 169	464	— r. Mitchell, 115 Mass. 141	476
Caldwell v. Cook, 5 Litt. 181	567	— v. New Bedford Bridge, 2 Gray, 839	46
Campbell v. Holt, 115 U. S. 620	386	— v. Nichols, 10 Met. 259	465
Canty v. Lattner, 31 Minn. 239	378	— v. Piper, 120 Mass. 185	582
Carleton v. Akron Sewer Pipe Co. 129 Mass. 40	64	— v. Pope, 103 Mass. 440	474
Carnegie v. Morrison, 2 Met. 881	567	— v. Putnam, 4 Gray, 16	464
Carpenter v. King, 9 Met. 511	557	— v. Quin, 5 Gray, 478	472
— v. Snelling, 97 Mass. 452	382	— v. Rogers, 185 Mass. 536	597
— v. Walker, 140 Mass. 416	386	— v. Salmon, 186 Mass. 481	597
Carrington v. Roots, 2 M. & W. 248	387	— v. Stodder, 2 Cush. 562	208
Carver v. Peck, 131 Mass. 291	218	— v. Sullivan, 11 Gray, 208	190
Cass v. Boston & Lowell Railroad, 14 Allen, 448	358	— v. Taylor, 105 Mass. 172	462
Caswell v. Cross, 120 Mass. 545	64	— v. Tiffany, 119 Mass. 300	75
Chaffin v. Chaffin, 4 Gray, 280	239	— v. Towle, 188 Mass. 490	536
Chandler v. Simmons, 97 Mass. 508	430	— v. Union Ins. Co. 5 Mass. 280	421
Chase v. Sanborn, 4 Cliff. 306	89	— v. Wachendorf, 141 Mass. 270	462
Cheever v. Congdon, 34 Mich. 296	468	— v. Wallace, 14 Gray, 382	472
— v. Perley, 11 Allen, 584	494	— v. Welsh, 7 Gray, 324	75
Cheney v. Whitely, 9 Cush. 289	108	Connecticut & Passumpsic Rivers Railroad v. Bailey, 24 Vt. 465	354
Chickering v. Lovejoy, 13 Mass. 51	232	Connecticut River Railroad v. County Commissioners, 127 Mass. 50	396
Chouteau v. Webster, 6 Met. 1	203	Cook v. Babcock, 11 Cush. 206	571
Christmas v. Russell, 14 Wall. 69	877	— v. Doggett, 2 Allen, 439	344
City Bank v. Bruce, 17 N. Y. 507	155	— v. Johnson, 121 Mass. 326	595
Clapp v. Clapp, 97 Mass. 581	362	Coombs v. New Bedford Cordage Co. 102 Mass. 572	823, 528
Clark v. Clark, 108 Mass. 522	453	Cooper v. Ulmann, Walk (Mich.) 251	434
— v. Jones, 5 Allen, 379	215	Cornell v. Andrews, 8 Stew. (N. J.) 7	68
— v. Parker, 106 Mass. 554	89	— v. — 9 Stew. 321	68
— v. Randall, 9 Wis. 135	64	Corning v. Southland, 3 Hill (N. Y.) 552	64
— v. Slaughter, 34 Miss. 65	386	Cortelyou v. Lansing, 2 Caines Cas. 200	344
Clay v. McClanahan, 5 B. Mon. 241	567	Couch v. Steel, 3 El. & Bl. 402	559
Cleveland v. Hallett, 6 Cush. 403	70	Crawshaw v. Collins, 2 Russ. 325	106
Coburn v. Hollis, 3 Met. 125	571	Crease v. Babcock, 10 Met. 525	155
— v. Palmer, 10 Cush. 273	108	Cresson's appeal, 30 Penn. St. 437	27
Cockfield v. Hudson, 1 Brev. 311	886	Crewe v. Crewe, 3 Hagg. Eccl. 123	363
Codman v. Evans, 1 Allen, 443	89	Croucher v. Oakman, 3 Allen, 185	561
Coleman v. Columbia Oil Co. 51 Penn. St. 74	155	Cumming v. Cumming, 185 Mass. 386	362
— v. Hall, 12 Mass. 570	230	Cummings v. Barrett, 10 Cush. 186	410
Collett v. Foster, 2 H. & N. 356	61	— v. Bramhall, 120 Mass. 562	453
Collins v. Wheeler, 1 Sprague, 188	550	Cunningham v. Butler, 142 Mass. 47	54
Combs v. Scott, 12 Allen, 493	542	Currier v. Lebanon Slate Co. 56 N. H. 262	155
Comins v. Turner's Falls Co. 188 Mass. 222	445	Curtis v. Williamson, L. R. 10 Q. B. 57	213
Commonwealth v. Alger, 7 Cush. 53	45	Cushing v. Field, 9 Met. 180	228
— v. Barrett, 106 Mass. 302	75	Cutter v. Richardson, 125 Mass. 72	128
— v. Berkshire Ins. Co. 98 Mass. 25	413	Daggett v. Shaw, 5 Met. 223	440
— v. Blood, 11 Gray, 74	474	Dahill v. Booker, 140 Mass. 306	518
— v. Briant, 142 Mass. 463	468	Daniels v. Meinhard, 53 Ga. 359	378
— v. Davis, 121 Mass. 352	597		
— v. Dunbar, 9 Gray, 298	464		
— v. Edds, 14 Gray, 406	465		
— v. Everson, 140 Mass. 292	597		
— v. Holmes, 119 Mass. 195	464		

<i>Darling v. Andrews</i> , 9 Allen, 106	375	<i>Fourth National Bank v. Noonan</i> , 14 Mo. App. 243	372
<i>Davis v. Sherman</i> , 7 Gray, 291	440	<i>Fowle v. Ward</i> , 113 Mass. 548	426
<i>Dawkins v. Penrhyn</i> , 6 Ch. D. 318	890	<i>Franklin Glass Co. v. White</i> , 14 Mass. 286	354
— v. — 4 App. Cas. 51	390	<i>Freeman v. Freeman</i> , 136 Mass. 260	98
<i>Dearborn v. Dearborn</i> , 15 Mass. 316	64	<i>Fuller v. Meehan</i> , 118 Mass. 135	107
<i>Dehon v. Foster</i> , 4 Allen, 545	48, 54	<i>Gale v. Blaikie</i> , 129 Mass. 206	82
— v. — 7 Allen, 57	48	<i>Gardner v. Smith</i> , 5 Heisk. 256	878
<i>Denny v. Kettell</i> , 135 Mass. 138	241	<i>Gay v. Bates</i> , 99 Mass. 263	358
<i>De Riemer v. Cantillon</i> , 4 Johns. Ch. 85	481	— v. Boston & Albany Railroad, 141 Mass. 407	299
<i>Des Moines v. Hinkley</i> , 62 Iowa, 637	378	<i>Geist's appeal</i> , 104 Penn. St. 351	378
<i>Dickinson v. Durfee</i> , 139 Mass. 232	482	<i>George v. Gobey</i> , 128 Mass. 289	464
— v. Williams, 11 Cush. 258	588	<i>Gerrish v. New Bedford Institution</i> for Savings, 128 Mass. 159	453
— v. Worcester, 7 Allen, 19	116	<i>Gibson v. Cooke</i> , 20 Pick. 15	878
<i>Dinkey v. Commonwealth</i> , 17 Penn. St. 126	456	<i>Giles v. Ash</i> , 128 Mass. 358	375
<i>District Attorney v. Lynn &amp; Boston</i> Railroad, 16 Gray, 242	419	<i>Gill v. Wells</i> , 59 Md. 492	68
<i>Donald v. Suckling</i> , L. R. 1 Q. B. 585	845	<i>Gillam v. Taylor</i> , L. R. 16 Eq. 581	218
<i>Donley v. Hays</i> , 17 S. & R. 400	434	<i>Gipps v. Gipps</i> , 3 Sw. & Tr. 116	368
<i>Downs v. Fuller</i> , 2 Met. 135	232	<i>Glazier v. Carpenter</i> , 16 Gray, 385	190
<i>Drake v. Curtis</i> , 1 Cush. 895	23	<i>Goodman v. Munks</i> , 8 Port. 84	890
<i>Drum v. Drum</i> , 133 Mass. 566	15	<i>Gordon v. Jenney</i> , 16 Mass. 465	64
<i>Dundee Harbour v. Dougall</i> , 1 Macq. 317	390	<i>Gowen v. Klous</i> , 101 Mass. 449	140
<i>Dunham v. Jackson</i> , 6 Wend. 22	345	<i>Grafton Bank v. Cox</i> , 13 Gray, 508	295
— v. Presby, 120 Mass. 285	421	<i>Gragg v. Learned</i> , 109 Mass. 167	74
<i>Dunlap v. Watson</i> , 124 Mass. 305	105	<i>Grain v. Aldrich</i> , 38 Cal. 514	378
<i>Dupee v. Boston Water Power Co.</i> 114 Mass. 37	155	<i>Granger v. Parker</i> , 137 Mass. 228	189
<i>Easterbrooks v. Tillinghast</i> , 5 Gray, 17	69	<i>Gray v. Wass</i> , 1 Greenl. 257	64
<i>Edgerly v. Emerson</i> , 23 N. H. 555	77	<i>Green v. Van Buskirk</i> , 5 Wall. 307, and 7 Wall. 139	49, 54
<i>Edson v. Munsell</i> , 10 Allen, 557	892	<i>Greenough v. Welles</i> , 10 Cush. 571	70
<i>Eidt v. Cutter</i> , 127 Mass. 522	561	<i>Grosvenor v. Danforth</i> , 16 Mass. 74	232
<i>Elizabeth v. Pavement Co.</i> 97 U. S. 126	103	<i>Groveland v. Medford</i> , 1 Allen, 23	510
<i>Ellis v. Boston, Hartford, &amp; Erie</i> Railroad, 107 Mass. 1	595	<i>Guthrie v. Jones</i> , 108 Mass. 191	888
<i>Emory v. Parrott</i> , 107 Mass. 95	426	<i>Hall, Ex parte</i> , 10 Ch. D. 615	378
<i>Erwin v. Blake</i> , 8 Pet. 18	64	— v. Hall, 4 Allen, 39	302
<i>Etheridge v. Vernoy</i> , 74 N. C. 809	378	<i>Halliday v. Holgate</i> , L. R. 3 Ex. 299	345
<i>Evans v. Warren</i> , 122 Mass. 308	16	<i>Halsey v. McLean</i> , 12 Allen, 438	353
<i>Fairbanks v. Stanley</i> , 18 Maine, 296	64	<i>Hamilton v. Doolittle</i> , 37 Ill. 478	239
<i>Falis v. Conway Ins. Co.</i> 7 Allen, 46	521	<i>Hancock v. Franklin Ins. Co.</i> 114 Mass. 155	316, 392, 435
<i>Fall River v. Riley</i> , 140 Mass. 488	191	<i>Handy v. Handy</i> , 124 Mass. 394	302
<i>Faversham v. Ryder</i> , 5 DeG., M. & G. 350	28	<i>Hannan v. Hannan</i> , 123 Mass. 441	435
<i>Fay v. Gray</i> , 124 Mass. 500	344	<i>Hanson v. South Scituate</i> , 115 Mass. 336	74
— v. Smith, 1 Allen, 477	15	<i>Harlow v. Dehon</i> , 111 Mass. 195	251
<i>Felton v. Minot</i> , 7 Allen, 412	82	<i>Harrington v. Worcester</i> , 6 Allen, 576	577
<i>Field v. Mayor</i> , 2 Seld. 179	878	<i>Harris v. Brooks</i> , 21 Pick. 195	557
<i>First National Bank v. Kimberlands</i> , 16 W. Va. 555	878	— v. Harris, 2 Hagg. Eccl. 376	365
<i>Fitchburg Railroad v. Page</i> , 131 Mass. 391	340	— v. Newbury, 128 Mass. 321	287
<i>Flanders v. Sherman</i> , 18 Wis. 575	64	<i>Hartridge v. Rockwell</i> , R. M. Charit. 290	155
<i>Fletcher v. Dickinson</i> , 7 Allen, 23	346	<i>Harvey v. Hunt</i> , 119 Mass. 279	272
<i>Forbes v. Howe</i> , 102 Mass. 427	20	<i>Hathaway v. Fall River National</i> Bank, 131 Mass. 14	346
<i>Fordyce v. Nelson</i> , 91 Ind. 447	378	<i>Haven v. Adams</i> , 4 Allen, 80	591
<i>Foreman v. Bigelow</i> , 4 Cliff. 508	356	<i>Hawks v. Charlemont</i> , 110 Mass. 110	561
<i>Forster v. Abraham</i> , L. R. 17 Eq. 351	67	<i>Hays v. Riddle</i> , 1 Sandf. 248	79
<i>Foster v. Sampson</i> , 1 Sprague, 182	559	<i>Heard v. Lodge</i> , 20 Pick. 53	64
		<i>Heburn v. Warner</i> , 112 Mass. 271	435
		<i>Hedden v. Hedden</i> , 6 C. E. Green, 61	864



Hemmenway v. Hickes, 4 Pick. 497	232	Kennedy v. Duncklee, 1 Gray, 65	109
Henderson v. Benson, 141 Mass. 218	190	Keyes v. Wood, 21 Vt. 331	434
Henry v. Davis, 123 Mass. 345	585	Kidder v. Dunstable, 7 Gray, 104	289
— v. Vermillion & Ashland Rail- road, 17 Ohio, 187	272	Kimball v. Comstock, 14 Gray, 508	123
Henshaw v. Hunting, 1 Gray, 203	24	— v. Grand Lodge of Masons, 131 Mass. 59	388
Hichins v. Lyon, 35 Ill. 150	232	King v. Ham, 6 Allen, 298	77
Hill v. Eldridge, 126 Mass. 234	468	— v. Welcome, 5 Gray, 41	387
— v. Ferrott, 3 Taunt. 274	198	Kingsman v. Perkins, 105 Mass. 111	375
Hindle v. Blades, 5 Taunt. 225	520	Kingsley v. Davis, 104 Mass. 178	213
Hodges v. Hodges, 3 Hagg. Eccl. 118	864	Kline v. Baker, 90 Mass. 253	568
Homes v. Crane, 2 Pick. 607	78	Knowlton v. Cooley, 102 Mass. 283	874
Howard v. Lovegrove, L. R. 6 Ex. 43	585	Lafin v. Field, 6 Met. 287	232
Howe v. Bartlett, 8 Allen, 20	519	Lamb v. Clark, 5 Pick. 193	393
Howell v. Hair, 15 Ala. 194	386	— v. Western Railroad, 7 Allen, 98	358
Howland v. Shurtleff, 2 Met. 26	494	Lane v. Boston & Albany Railroad, 112 Mass. 455	358
Hoxie v. Finney, 16 Gray, 332	230	Langdon v. Potter, 11 Mass. 318	64
Hubbell v. East Cambridge Savings Bank, 182 Mass. 447	388	Lannan v. Smith, 7 Gray, 150	374
Hunnicutt v. Peyton, 102 U. S. 338	440	Lapping v. Duffy, 47 Ind. 51	378
Hunt v. Colburn, 1 Sprague, 215	561	Lawrence v. Batcheller, 131 Mass. 504	49
— v. Lowell Gas Light Co. 1 Allen, 343	84	Leary v. Boston & Albany Railroad, 189 Mass. 580	322
Hutchins v. New England Coal Min- ing Co. 4 Allen, 580	358	Lee v. Woolsey, 110 Penn. St.	324
Hyams v. Michel, 3 Rich. (S. Car.) 303	64	Leonard v. Leonard, 7 Allen, 277	387
Hyatt v. Bank of Kentucky, 8 Bush, 193	567	Le Roy v. Crowninshield, 2 Mason, 151	390
Ide v. Pierce, 184 Mass. 290	453	Lewis v. Mott, 36 N. Y. 895	345
Isaac v. De Friez, Ambl. 595	218	Lincoln v. Taunton Copper Co. 9 Allen, 181	561
Jackson v. Phillips, 14 Allen, 539	27, 217	Little v. Gould, 2 Blatchf. 165	89
Jacot v. Wyatt, 10 Gray, 236	108	Long v. Colton, 116 Mass. 414	440
Jamaica Pond Aqueduct v. Chandler, 9 Allen, 159	239	Loring v. Bacon, 8 Cush. 465	402
Jarvis v. Rogers, 13 Mass. 105	346	— v. Eliot, 16 Gray, 568	69
— v. — 15 Mass. 389	346	Lothrop v. Bailey, 14 Allen, 514	107
Jeffery v. Bastard, 4 A. & E. 823	520	Loving v. Loving, 3 Hagg. Eccl. 85	364
Jeffries v. Jeffries, 117 Mass. 184	67	Luckett v. Triplett, 2 B. Mon. 39	567
Jenney v. Delesdernier, 20 Maine, 183	64	Lund v. Tyngsboro, 11 Cush. 563	288
Jewett v. Dringer, 3 Stew. (N. J.) 291	389	Lynch v. Smith, 104 Mass. 52	312
Johnson v. Ames, 11 Pick. 173	251	Lyster v. Lyster, 111 Mass. 827	362
— v. Boston & Maine Railroad, 125 Mass. 75	301	McConnel v. Reed, 4 Scam. 117	239
Jones v. Dow, 137 Mass. 119	140	Macdonald v. Richardson, 1 Giff. 81	106
— v. Hoar, 5 Pick. 285	198	McDonough v. Miller, 114 Mass. 94	116
— v. Jones, 18 Ala. 248	386	McElroy v. McElroy, 113 Mass. 509	70
— v. Sisson, 6 Gray, 288	853	McKay v. Mumford, 10 Wend. 851	589
Joslyn v. Wyman, 5 Allen, 62	550	McKee v. Hann, 9 Dana, 526	482
Kansas & Eastern Railroad Con- struction Co. v. Topeka, Salina, & Western Railroad, 135 Mass. 34	353	McKim v. Blake, 189 Mass. 593	428
Katama Land Co. v. Jernegan, 126 Mass. 155	854	McKinney v. Whiting, 8 Allen, 207	123
Keegan v. Kavanaugh, 62 Mo. 230	823	McMaster v. Ins. Co. of North Amer- ica, 55 N. Y. 222	77
Kellogg v. Kimball, 122 Mass. 163	128	McNeil v. Ames, 120 Mass. 481	212
— v. — 135 Mass. 125	128	Macomber v. Doane, 2 Allen, 541	375
— v. — 138 Mass. 441	128	M'Pherson v. Cunliff, 11 S. & R. 422	481
— v. — 139 Mass. 296	128	Mann v. Blanchard, 2 Allen, 386	128
Kendall v. May, 10 Allen, 59	581	— v. Brewer, 7 Allen, 202	129
Kennebec & Portland Railroad v. Kendall, 31 Maine, 470	854	Manning v. Albee, 11 Allen, 520	461
		Manson v. Felton, 13 Pick. 206	511
		Marsh v. Dodge, 66 N. Y. 533	194
		Marston v. Roe, 8 A. & E. 14	245
		Massachusetts Hospital Life Ins. Co. v. Wilson, 10 Met. 126	595

Mather v. Corliss, 103 Mass. 568	510	Palmer v. Merrill, 6 Cush. 282	376
Mattey v. Whittier Machine Co. 140 Mass. 337	314	Papineau v. Naumkeag Steam Cotton Co. 126 Mass. 872	374
May v. Wannemacher, 111 Mass. 202	54	Parker v. Nickerson, 137 Mass. 487	179
Mayer v. Hermann, 10 Blatchf. 256	64	— v. Parker, 1 Allen, 245	571
Mechanics' Foundry Co. v. Hall, 121 Mass. 272	354	— v. Winnipiseogee Cotton Co. 2 Black, 545	419
Melvin v. Lamar Ins. Co. 80 Ill. 446	272	Parks v. Newburyport, 10 Gray, 28	116
Messenger v. Dennie, 137 Mass. 197	314	Pattison v. Hull, 9 Cowen, 747	434
— v. — 141 Mass. 335	314	Peck v. Denniston, 121 Mass. 17	90, 592
Miller v. Hanover Junction & Susquehanna Railroad, 87 Penn. St. 95	272	— v. Emery, 1 Allen, 463	107
Milliken v. Pratt, 125 Mass. 374	567	Penobscot & Kennebec Railroad v. Bartlett, 12 Gray, 244	353
Mills v. Shepard, 30 Conn. 98	239	People v. Stock Brokers Building Co. 92 N. Y. 98	68
Moffatt v. Buchanan, 11 Humph. 869	391	Percival v. Dunn, 29 Ch. D. 128	377
Moore v. Fitchburg Railroad, 4 Gray, 465	61	Perrigo v. Spaulding, 13 Blatchf. 389	195
— v. Ware, 38 Maine, 496	434	Peugh v. Porter, 112 U. S. 787	377
Morrell v. Fisher, 4 Exch. 591	289	Phelps v. Webster, 134 Mass. 17	504
Morris v. Callanan, 105 Mass. 129	571	Philadelphia's appeals, 86 Penn. St. 179	378
Morrissey v. Eastern Railroad, 126 Mass. 377	301	Phillips v. Bowers, 7 Gray, 21	592
Moss, Ex parte, 14 Q. B. D. 810	378	— v. Phillips, 1 Rob. Eccl. 144	363
Motley v. Sargent, 119 Mass. 231	89	Pickens v. Davis, 134 Mass. 252	517
Moulton v. Bowker, 115 Mass. 36	64	Pierce v. Cate, 12 Cush. 190	295
— v. Gage, 133 Mass. 390	322	— v. O'Brien, 129 Mass. 314	54
Mowry v. Whitney, 14 Wall. 620	102	Pine v. Smith, 11 Gray, 38	567
Mulligan v. Curtis, 100 Mass. 512	312	Planters' Bank v. Massey, 2 Heisk. 360	64
Murphy v. Boston & Albany Railroad, 133 Mass. 121	301	Plymouth v. Russell Mills, 7 Allen, 438	160
Myers v. Callaghan, 20 Fed. Rep. 441	89	Pomeroy v. Trimper, 8 Allen, 398	520
National Exchange Bank v. McLoon, 73 Maine, 498	377	Post v. Boston, 141 Mass. 189	537
Newby v. Blakey, 3 Hen. & M. 57	891	Powers v. Raymond, 137 Mass. 483	214
Newcomb v. Goss, 1 Met. 333	280	Prather v. Weissiger, 10 Bush, 117	567
New England Ins. Co. v. Phillips, 141 Mass. 535	421	Pratt v. Putnam, 13 Mass. 361	64
New Hampshire Central Railroad v. Johnson, 10 Foster, 390	354	Preston v. Briggs, 16 Vt. 124	386
New Haven & Northampton Co. v. Hayden, 117 Mass. 433	586	Priestly v. Fernie, 3 H. & C. 977	218
New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650	41	Prince v. Samo, 7 A. & E. 627	184
Nichols v. Bucknam, 117 Mass. 488	586	Public Schools v. Heath, 2 McCarter, 22	372
Nickerson v. Swett, 135 Mass. 514	15	Raymond v. Crown & Eagle Mills, 2 Met. 319	213
Nightingale v. Burrell, 15 Pick. 104	217	Reed v. Crapo, 127 Mass. 39	577
Niles v. Patch, 18 Gray, 264	440	Reeves v. Capper, 5 Bing. N. C. 136	78
Norcross v. James, 140 Mass. 188	387	Reggio v. Braggiotti, 7 Cush. 166	585
Norton v. Piscataqua Ins. Co. 111 Mass. 532	375	Regina v. Baylis, 4 Cox. C. C. 23	580
Noyes v. Johnson, 139 Mass. 436	67	— v. Hill, 5 Cox C. C. 259	581
Nudd v. Hamblin, 8 Allen, 130	392	— v. Jones, 4 Cox C. C. 198	462
Oakes v. Hill, 14 Pick. 442	74	— v. Milton, Jr. Cir. Rep. 16	580
O'Connor v. Boston & Lowell Railroad, 135 Mass. 352	312	— v. Nicholas, 2 C. & K. 246	579
Ogden v. Rummens, 3 F. & F. 751	322	Rex v. Heaps, 2 Salk. 593	458
Orcutt v. Nelson, 1 Gray, 538	587	— v. Sudbury, 1 Ld. Raym. 484	456
Osborne v. Rowlett, 18 Ch. D. 774	67	— v. Wade, R. & M. 86	579
Owen v. De Beauvoir, 16 M. & W. 547	390	— v. White, 1 Leach, 430	580
— v. — 5 Exch. 166	390	— v. Williams, 7 C. & P. 320	579
Packard v. Marshall, 133 Mass. 301	69	Rice v. Loomis, 139 Mass. 302	589
Packer v. Hinckley Locomotive Works, 122 Mass. 484	120	— v. National Bank of the Commonwealth, 126 Mass. 300	421
		Richardson v. Hall, 124 Mass. 228	264
		Ricker v. American Loan & Trust Co. 140 Mass. 346	55
		Ripley v. Sampson, 10 Pick. 371	354
		Risley v. Phenix Bank, 88 N. Y. 318	878
		Robbins v. Bacon, 3 Greenl. 346	877

Robbins v. Robbins, 140 Mass. 528	368	Sohier v. Williams, 1 Curtis C. C. 479	68
— v. Townsend, 20 Pick. 345	74	Spaulding v. Page, 1 Sawyer, 702	196
Roberge v. Burnham, 124 Mass. 277	464	Springfield Card Manuf. Co. v. West,	
Roberts v. Gurney, 120 Mass. 33	358	1 Cush. 388	141
— v. Smith, 2 H. & N. 218	322	Spragg v. Shriver, 25 Penn. St. 282	481
Robinson v. Hodge, 117 Mass. 222	228	Stanhope's case, L. R. 1 Ch. 161	272
— v. Pittsburg & Connellsville		Starling v. Blair, 4 Bibb, 288	239
Railroad, 32 Penn. St. 384	272	State v. Cain, 9 W. Va. 559	468
Robison v. Beall, 26 Ga. 17	155	— v. Smith, 48 Vt. 266	155
Rogers v. Rogers, 3 Hagg. Eccl. 57	308	Steam Stone Cutter Co. v. Short-	
Rous v. Patterson, 16 Vin. Abr. 400	520	sleeves, 16 Blatchf. 381	194
— v. — Bull. N. P. 60	520	— v. Windsor Manuf. Co. 17	
Rowell v. Lowell, 7 Gray, 100	289	Blatchf. 24	195
Rubber Co. v. Goodyear, 9 Wall. 788	108	Stearns v. Quincy Ins. Co. 124 Mass.	
Russell v. Allen, 2 Allen, 42	595	61	878
— v. Tillotson, 140 Mass. 201	322	Stetson v. Wolcott, 15 Gray, 545	181
Samuels v. Borrowscale, 104 Mass.		Stevens v. Austin, 1 Met. 557	124
207	74	Stone v. Lane, 10 Allen, 74	550
Sanderson v. Bradford, 10 N. H. 260	52	— v. Stone, 3 Notes of Cases, 278	364
Santom v. Ballard, 138 Mass. 464	190	Stow v. Sawyer, 3 Allen, 515	510
Sawyer v. Kendall, 10 Cush. 241	387	Straw v. Greene, 14 Allen, 206	184
Schlesinger v. Sherman, 271 Mass.		Stutz v. Armstrong, 25 Fed. Rep. 147	195
206	212	Sullivan v. India Manuf. Co. 113	
Schooling v. M'Ghee, 1 T. B. Mon.		Mass. 396	528
232	567	Sutton Parish v. Cole, 8 Pick. 232	510
Schoregge v. Gordon, 29 Minn. 367	64	Swan v. Crafts, 124 Mass. 453	54
Scott v. Berkshire County Savings		Sweet v. Brown, 12 Met. 175	239
Bank, 140 Mass. 157	453	Taft v. Bowker, 132 Mass. 277	375
Sears v. Dennis, 105 Mass. 310	288	Tarbell v. Jewett, 129 Mass. 457	232
— v. Hardy, 120 Mass. 524	248	Talty v. Freedmen's Savings &	
— v. Russell, 8 Gray, 86	217	Trust Co. 98 U. S. 321	345
Seay v. Bacon, 4 Sneed, 99	391	Taylor v. Carew Manuf. Co. 140	
Sewall v. Boston Water Power Co.		Mass. 150	322
4 Allen, 277	426	— v. Cheever, 6 Gray, 146	344
Seymour v. Sturges, 26 N. Y. 134	354	— v. Lynch, 5 Gray, 49	374
Sharps v. Eccles, 5 T. B. Mon. 69	567	— v. Miami Exporting Co. 6	
Shaw v. Boston & Worcester Rail-		Ohio, 176	155
road, 8 Gray, 45	84	Temple v. Turner, 128 Mass. 125	559
Sheffield v. Page, 1 Sprague, 265	561	Terry v. Little, 101 U. S. 216	353
Sherman v. New Bedford Savings		Thayer v. Mann, 19 Pick. 535	392, 435
Bank, 138 Mass. 581	3, 453	Thomas v. Boston & Providence	
Shillaber v. Wyman, 15 Mass. 322	230	Railroad, 10 Met. 472	353
Shouse v. Commonwealth, 5 Barr, 83	456	— v. Hunt, 17 C. B. (N. S.) 183	194
Shurtleff v. Francis, 118 Mass. 154	453	Thompson v. Moore, 4 T. B. Mon. 79	567
Sibley v. Holden, 10 Pick. 249	592	Thorndike v. Loring, 15 Gray, 891	217
Sickels v. Borden, 3 Blatchf. 535	195	Toof v. Martin, 13 Wall. 40	20
Sizer v. Ray, 87 N. Y. 220	194	Tooth v. Hallett, L. R. 4 Ch. 242	378
Slater v. Jepherson, 6 Cush. 129	571	Townley v. Bedwell, 6 Ves. 194	28
Smith v. Compton, 3 B. & Ad. 189	585	Townsend v. Jemison, 9 How. 407	891
— v. Dunham, 8 Pick. 246	15	Tracy v. Goodwin, 5 Allen, 409	141
— v. Harrington, 4 Allen, 566	69	— v. Maloney, 105 Mass. 90	141
— v. Holcomb, 99 Mass. 552	109	Trecothick v. Austin, 4 Mason, 16	251
— v. Keal, 9 Q. B. D. 840	63	Tripp v. Brownell, 12 Cush. 376	373
— v. Mutual Ins. Co. 14 Allen,		Trist v. Child, 21 Wall. 441	377
336	353	True v. Triplett, 4 Met. (Ky.) 57	567
— v. Oakes, 141 Mass. 451	559	Trull v. Skinner, 17 Pick. 213	521
— v. Palmer, 6 Cush. 513	128	Turner v. Austin, 16 Mass. 181	64
— v. Putnam, 3 Pick. 221	213	Union Bank v. Geary, 5 Pet. 98	64
— v. Shepard, 15 Pick. 147	595	Union Railway v. Mayor & Alder-	
— v. Slocomb, 9 Gray, 38	592	men of Cambridge, 11 Allen, 287	208
— v. Spooner, 3 Pick. 229	511	University of London v. Yarrow, 28	
— v. Warden, 19 Penn. St. 424	481	Beav. 159	28
— v. Williams, 116 Mass. 510	248	Upton v. South Reading Bank, 120	
Smith Charities v. Northampton, 10		Mass. 153	550
Allen, 498	452		

<b>Voss v. Morton</b> , 4 Cush. 27	232	<b>Whitney v. Eliot National Bank</b> , 137 Mass. 351	875
<b>Wakefield v. Martin</b> , 3 Mass. 558	375	<b>Whitton v. Bicknell</b> , 3 Allen, 472	108
<b>Walker v. Boynton</b> , 120 Mass. 349	89	<b>Widgery v. Haskell</b> , 5 Mass. 144	55
— <i>v. Curtis</i> , 116 Mass. 98	578	<b>Wilbur v. Wilbur</b> , 13 Met. 404	589
— <i>v. Davis</i> , 1 Gray, 506	198	<b>Wilder v. Adams</b> , 16 Gray, 478	198
— <i>v. Hill</i> , 17 Mass. 380	230	<b>Wilkinson v. Verity</b> , L. R. 6 C. P. 206	393
— <i>v. Schreiber</i> , 47 Iowa, 529	434	<b>Willard v. Goodrich</b> , 31 Vt. 597	64
— <i>v. Whiting</i> , 23 Pick. 813	70	<b>Williams v. Churchill</b> , 137 Mass. 243	322
<b>Warner v. Jaffray</b> , 96 N. Y. 248	49	— <i>v. Ingersoll</i> , 89 N. Y. 508	375
<b>Warren v. Comings</b> , 6 Cush. 103	371	— <i>v. Leyden</i> , 119 Mass. 237	288
— <i>v. Sullivan</i> , 123 Mass. 283	375	— <i>v. Savage Manuf. Co.</i> 3 Md. Ch. 418	155
<b>Washburn v. Goodman</b> , 17 Pick. 519	106	<b>Williston v. Morse</b> , 10 Met. 17	571
— <i>v. Miller</i> , 117 Mass. 376	419	<b>Wilson v. Bigger</b> , 7 Watts & S. 111	481
<b>Watuppa Reservoir Co. v. Fall River</b> , 134 Mass. 267	396	— <i>v. Little</i> , 2 Comst. 448	346
<b>Way v. Davidson</b> , 12 Gray, 465	79	<b>Winburn v. Cochran</b> , 9 Tex. 123	386
<b>Wayland v. Ware</b> , 109 Mass. 248	74	<b>Wood v. Denny</b> , 7 Gray, 540	128
<b>Webb v. Neal</b> , 5 Allen, 575	510	— <i>v. Foster</i> , 8 Allen, 24	440
<b>Webster v. Lowell</b> , 2 Allen, 123	141	— <i>v. Mann</i> , 125 Mass. 319	141
<b>Wedderburn v. Wedderburn</b> , 22 Beav. 84	106	<b>Woodley v. Metropolitan District Railway</b> , 2 Ex. D. 384	322
<b>Weed v. Donovan</b> , 114 Mass. 181	481	<b>Woodward v. Sartwell</b> , 129 Mass. 210	239
<b>Welch v. Adams</b> , 1 Met. 494	595	— <i>v. Woodward</i> , 14 Stew. Eq. 224	365
— <i>v. Mandeville</i> , 1 Wheat. 233	377	<b>Worcester v. Eaton</b> , 13 Mass. 371	510
— <i>v. —</i> 5 Wheat. 277	377	<b>Worthington v. Hylyer</b> , 4 Mass. 196	239
<b>Wells v. Connable</b> , 133 Mass. 513	518	<b>Wortman v. Skinner</b> , 1 Beasley, 358	481
— <i>v. Prince</i> , 15 Gray, 562	128	<b>Wright v. Boston</b> , 126 Mass. 161	572
— <i>v. Ragland</i> , 1 Swan, 501	391	— <i>v. Boston &amp; Maine Railroad</i> , 129 Mass. 440	801
<b>Westfield v. Mayo</b> , 122 Mass. 100	585	— <i>v. Ellison</i> , 1 Wall. 16	377
<b>Wetherbee v. Green</b> , 22 Mich. 311	389	— <i>v. Herrick</i> , 128 Mass. 240	120
<b>Wheelwright v. Boston &amp; Albany Railroad</b> , 135 Mass. 225	256	<b>Young v. Durgin</b> , 15 Gray, 264	294
<b>White v. Godfrey</b> , 97 Mass. 472	89	— <i>v. Miller</i> , 6 Gray, 152	484
— <i>v. White</i> , 7 Ves. 423	218		
<b>White Mountains Railroad v. Eastman</b> , 34 N. H. 124	272		



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS.

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WILLIAM NUTT, administrator, *vs.* RUFUS MORSE & others.

Middlesex. March 18. — May 18, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

A. deposited several sums of money in a savings bank, "in trust" for certain relatives of his, and told each that he had done so, saying that he could control the money while he lived, but that it was theirs after his death. He gave the deposit-books into the possession of one of these persons, who had charge of A.'s books and papers; and A. drew the interest accruing on the several deposits. About a year before his death, A. said that he should not make a will; that he had provided for these relatives by depositing money in the savings bank. The night before he died, A. said to these persons, "When I am gone, you take these books and transfer the money to your own names, and say nothing to nobody about it." *Held*, that there was not a perfected gift of the money to said persons; and that the administrator of A.'s estate was entitled to it.

BILL IN EQUITY, filed November 17, 1883, by the administrator of the estate of Calvin Morse, to obtain the instructions of the court as to the disposition of certain funds. The case was referred to a master, who found the following facts:

The plaintiff's intestate, Calvin Morse, in 1873, was living in Natick. He was unmarried, and with his brother, Rufus Morse, and sister, Caroline Morse, lived in a house owned by himself. Maria Hayes was his sister, living near him, and Edgar S. Hayes

was her son. The other parties to this suit were the descendants of a deceased brother, Willard Morse.

On April 5, 1873, Calvin Morse deposited \$1000 in the Natick Five Cents Savings Bank in the name of "Calvin Morse, Tr. for E. S. Hayes," and took a deposit-book therefor, numbered 2903. In May, 1873, he gave the book to Edgar S. Hayes (who then and afterwards, till the time of Calvin Morse's death, had the care of his books and papers, and assisted him in various business transactions), and said, "Here is a book I want you to take care of; if you outlive me, it is yours."

On June 13, 1873, Calvin Morse deposited in said bank \$4000, the proceeds of a sale of land. These deposits were made as follows: "Book 3006, \$1000; Calvin Morse in trust for Rufus Morse. Book 3007, \$1000; Calvin Morse in trust for Edgar S. Hayes. Book 3008, \$1000; Calvin Morse in trust for Caroline Morse. Book 3009, \$1000; Calvin Morse in trust for Maria Hayes." These four books were put in the care of Edgar S. Hayes. Morse informed each of these four persons that he had deposited these sums. To Maria Hayes he said, "I can control this while I live, but if I die without drawing it, it is yours." To Rufus and Caroline Morse he said, that he had put in these sums in trust; that he could do what he had a mind to with the money while he lived, but that it was theirs after he died.

Calvin Morse knew, at the time of these deposits, that he could not draw interest on any sum over \$1000.

On November 15, 1873, Calvin Morse drew out the interest which had accrued on these several deposits; and on May 5, 1874, Edgar S. Hayes, under the direction of Calvin Morse, drew the interest on said deposits, for which he accounted to him.

At this time, Calvin Morse was informed that, by a change of the statutes, the several deposits could be allowed to accumulate, by interest, to the amount of \$1600. He then directed Hayes to let the interest accumulate. Hayes remarked to him, that then he, Hayes, would get more; to which Morse replied, "What do you care? I should not think you would find fault with that."

About a year before his death, Calvin Morse said that he should not make a will; that he had provided for his brother and sisters and Edgar S. Hayes by depositing money in the savings bank.



The night before he died, Calvin Morse said to his brother and sisters, "When I am gone, you take these books and transfer the money to your own names, and say nothing to nobody about it." Calvin Morse died on March 30, 1881.

The deposit-books remained in the possession of Edgar S. Hayes till May 8, 1882, when he withdrew from the bank deposits 2903 and 3007. Hayes retained possession of books 3006, 3008, and 3009 till November, 1883, when he delivered them to the plaintiff, the administrator, who has retained them to this time.

The case was heard by *Field, J.*, and reserved for the consideration of the full court; such decree to be entered as justice might require.

*J. G. Abbott & S. A. Phillips*, for the descendants of Willard Morse.

*W. B. Gale & J. W. McDonald*, for the claimants.

MORTON, C. J. The funds in this case are claimed by a brother, two sisters, and a nephew of the deceased, upon the ground that they were given to them severally by him during his lifetime. The claims of each stand upon the same grounds substantially, there being no material difference in the evidence as to each alleged gift. Upon the facts found by the master, it is clear that there was no perfected gift to either of the claimants. The deceased deposited the money in his own name as trustee of each claimant, and told the claimant that he had done so. The books were in the possession of Edgar S. Hayes, one of the claimants, but he held them, as he did other papers of the deceased, merely as his agent or servant.

Calvin Morse retained the entire dominion and control of the funds, both principal and interest, during his life, and the facts show conclusively that he intended that no title to or interest in the funds should pass to the several claimants until after his death. The transaction was intended to be in the nature of a testamentary disposition, and was an attempted evasion of the statute of wills. *Sherman v. New Bedford Savings Bank*, 138 Mass. 581, and cases cited.

It follows that the funds remained the property of the depositor at the time of his death, and belong to the administrator, to be divided according to the statute of distributions.

*Decree accordingly.*

ROBERT B. CAVERLY, administrator, *vs.* LUMAN E. EASTMAN  
& others.

Middlesex. March 23. — May 8, 1886. W. ALLEN & HOLMES, JJ.,  
absent. C. ALLEN, J., did not sit.

The heirs of E. brought, with the knowledge of the administrator of E.'s estate, a bill in equity against S. with alternative prayers for damages and for specific performance of an agreement to convey certain real estate. A decree was entered that S. should execute a deed of the same to the heirs within three months, on payment of a certain sum. On the same day, a decree was made by the Probate Court, on the petition of the administrator, licensing him to sell the real estate of E. The only real estate of E. was that which was the subject of the bill in equity. The heirs did not pay S. the amount named in the decree, but brought a bill of review to reverse the judgment rendered in the suit in equity, which bill was dismissed for want of prosecution. *Held*, that the interest of the estate of E. and of his heirs had determined; and that the decree of the Probate Court must be reversed.

APPEAL by Luman E. Eastman, Charles J. Eastman, and Daniel J. Eastman, from a decree of the Probate Court, rendered July 14, 1885, on the petition, filed May 26, 1885, of Robert B. Caverly, administrator, with the will annexed, of the estate of Daniel Eastman, licensing him to sell the whole of the real estate of said Eastman described in the petition, and all the rights and interests which the devisees and heirs of said deceased have in the same.

The case was heard by *Field*, J., who reported it for the consideration of the full court, in substance as follows:

Daniel Eastman died on June 5, 1879. There remains unpaid a legacy given by the will of said Eastman to his son Martin V. B. Eastman of \$400, and the charges of administration, which amount to a large sum; and there is nothing to pay them with except the property described in the petition for license to sell. By the seventh article of his will Daniel Eastman directed "that the residue of my personal estate, if any, after payment of the above several legacies and bequests, shall be divided between the several children of my son Ebenezer S. Eastman, share and share alike." Ebenezer S. Eastman died soon after Daniel Eastman, leaving as his children Luman E. Eastman, Mary E. Eastman, Harvey J. Eastman, Daniel J. Eastman, and Charles J. Eastman, of whom the appellants are three. The appellants claim an interest in the property described in the

petition, under the seventh article of the will of Daniel Eastman. The petitioner desires leave to sell the rights which Daniel Eastman died possessed of in certain real estate under a bond from Benjamin F. Simpson, which bond is described in *Caverly v. Simpson*, 132 Mass. 462. The bill in equity there reported was dismissed on March 2, 1882. Subsequently, the five children of Ebenezer S. Eastman with Martin V. B. Eastman brought a bill in equity with alternative prayers for damages for the breach of the same bond, and for specific performance, against Benjamin F. Simpson, which on his death was defended by Elizabeth Simpson, executrix of his will, and this case is reported in 139 Mass. 348, and may be referred to. The final decree in the latter case was entered on July 14, 1885, and by it the defendant was ordered, within three months from that date, to execute a conveyance of the estate to the five plaintiffs first named, upon payment of the sum of \$9887.18. The plaintiffs did not pay or tender the sum prescribed by this decree to Mrs. Simpson within three months of the date of it, or at any time.

The charges of administration of the estate of Daniel Eastman are largely due to Mr. Caverly for money disbursed by him, and for professional services in the conduct of the suits mentioned, and other suits. The children of Ebenezer S. Eastman are poor; and, if the property is sold, the proceeds will be used to pay the legacy of M. V. B. Eastman and the charges of administration, and they will probably receive nothing, although the property is worth something more than the amount which, by the decree, these persons were to pay Mrs. Simpson.\*

Such decree was to be entered as justice might require.

*R. B. Caverly, pro se.*

*C. G. Saunders & F. W. Qua*, for the defendant, were not called upon.

FIELD, J. The petition for leave to file a bill of review, and the bill of review brought to reverse the final decree entered

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\* A petition for leave to file a bill of review, and a bill of review brought to reverse the final decree entered in the suit of Eastman against Simpson, above referred to, and to have a decree entered for damages, were dismissed by a single justice of this court. Appeals were taken, and the cases were entered on the docket of the full court. On March 23, 1886, both appeals were dismissed for want of prosecution.

in the suit of Luman J. Eastman and others against Elizabeth Simpson, executrix, having both been dismissed, and the appeals to the full court from the decrees dismissing these proceedings having also been dismissed, it follows that, by the lapse of time, all the interest of the estate of Daniel Eastman, and of all persons who claim under his will, in the bond and in the real estate therein described has determined; and, whether the decree of the Probate Court authorizing the petitioner to sell said real estate was right or not on the facts as they existed when that decree was entered, the decree must now be reversed, and the cause remitted to the Probate Court with directions to dismiss the petition.

*So ordered.*

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CLARK BROOKS vs. JONATHAN BIGELOW.

Suffolk. March 26. — May 8, 1886. W. ALLEN & HOLMES, JJ., absent.

If a check made in this Commonwealth, and payable to a resident of another State, is deposited by him in a bank there, where he has a general account, under an agreement that all checks drawn on banks in other places shall be passed to his credit on the day of deposit, but, if they are returned unpaid, they shall be charged to his account, and by the law of that State the bank is not his agent in collecting the check, but becomes the owner of it, with the right of charging it back to his account if it is not paid by the bank on which it is drawn, the receiver of the bank, which suspends business on the day of such deposit, may maintain an action for the amount of the check against the maker, who cannot avail himself, in defence, of the fact that, upon such suspension, the payee of the check stopped payment of the same.

CONTRACT, by the receiver of the Clairmont Savings Bank of New York, against the maker of two checks on the Blackstone National Bank of Boston, for \$144.33 and \$123.42, dated September 13 and 14, 1877, respectively, and payable to the order of C. S. Durling. Trial in the Superior Court, without a jury, before *Rockwell, J.*, who allowed a bill of exceptions, in substance as follows :

Durling testified that he was a resident of Brooklyn, New York; that, in the year 1877, he had a so-called check account with the Clairmont Savings Bank, which then did business in

the city of New York ; that the account was opened on October 9, 1874, and closed on September 15, 1877 ; that he was in the habit of making deposits to the credit of that account, and drawing checks against it ; that he deposited on this account one of the checks in suit on the 14th, and the other on the 15th of September, 1877 ; that he had a deposit-book or pass-book ; that the checks were deposited with other funds, namely, bills, but no other checks, the amounts credited being \$254.61 on the 14th, and \$276.66 on the 15th, said amounts including checks and bills ; that the deposits of these checks were entered by the receiving officers of the bank in this book, at the time he made the deposits, and that no statements were made to him at that time by either officers or clerks ; that the checks were delivered to said bank to be collected for him, and nothing occurred at the time of the deposits of these checks ; that he opened the account with the agreement, made with the president of the bank, that all out-of-town checks should be passed to his credit on the day of the deposit, but, if they were returned unpaid, they were to be charged to his account ; and that this agreement was explained to the receiving and paying tellers, and the checks were indorsed in blank under this agreement.

It was admitted that the receiver would testify, if called, that the bank was, and for some time prior thereto had been, insolvent ; but there was no evidence that the insolvency was known to the officers of the bank prior to its suspension, or that it had been fraudulently carried on. It was also admitted that the bank was a savings bank ; and that the bank suspended payment on September 15, 1877, the bank examiner having closed the same.

Due demand for payment of the checks was made upon the Blackstone National Bank, which refused payment, and upon the defendant.

It also appeared in evidence, uncontradicted, that, upon said suspension, Durling telegraphed to the defendant, and stopped payment of the checks. The checks were returned to the bank unpaid, but the bank did not return them to Durling. When the bank suspended, the amount deposited to Durling's credit was \$498.69, exclusive of said checks.

The law of New York in relation to savings banks — Rev. Sts. (6th ed.) c. 18, art. 9, §§ 368, *cl.* 7, 389, 397, and 399 — was put

in evidence by the defendants; and the case of *Metropolitan National Bank v. Lloyd*, 25 Hun, 101, and 90 N. Y. 530, was put in by the plaintiff.

The defendant requested the following findings and rulings: "1. That the checks in question were deposited by C. S. Durling for collection; that the bank received them as his agent for the purpose of collecting them, and depositing the proceeds to his credit. 2. That the suspension of said bank, before said checks were collected and paid, revoked said agency. 3. That Durling stopped the payment of said checks immediately after the suspension of the bank, and revoked said agency. 4. That, under the law of New York, said bank had no authority or power to receive said checks as a cash deposit, and must be deemed to have received them simply for collection as Durling's agent." All of which the judge refused.

The judge found that the relation existing between the bank and Durling, as testified to by him, was one by which the checks were credited as cash when deposited, with the right on the part of the bank of returning to Durling and charging back to him unpaid out-of-town checks, but did not compel such return; ruled that, if the bank did not return to Durling such checks, it had the right to recover upon them in this action, and that the defendant could not avail himself of the stoppage of payment of them by Durling as a defence; and found for the plaintiff in the sum of \$397.50. The defendant alleged exceptions.

*H. Stevens*, for the defendant.

*J. L. Stackpole*, for the plaintiff.

FIELD, J. The law of the State of New York was a fact, and the evidence introduced of what that law was, in connection with the other evidence, warranted the court in finding that, by that law, the bank was not merely the agent of Durling in collecting the checks, but became the owner of them, with the right of charging them back to Durling in his account if they were not paid by the bank on which they were drawn. On such a finding, the rulings of law were correct. There is nothing in the statutes of New York which were put in evidence that affects the rights of the plaintiff against the defendants.

*Exceptions overruled.*

MARY E. KENNEDY *vs.* WILLIAM SAUNDERS.

Norfolk. March 29. — May 8, 1886. W. ALLEN & HOLMES, JJ., absent.

A notice in writing, signed by the wife of a person having the habit of drinking intoxicating liquors to excess, to a seller of such liquors, as follows, "My husband has been in the habit of getting liquor here and coming home drunk, . . . I don't want you to give him any more drink," is a sufficient compliance with the Pub. Sts. c. 100, § 25.

In an action, under the Pub. Sts. c. 100, § 25, upon a declaration containing four counts, two of which allege the sale or delivery, at different times, of intoxicating liquors to a person having the habit of drinking such liquors to excess, within twelve months after having been notified not to make such sale or delivery, and the other two counts of which allege the permitting a loitering of such person upon the premises where the liquors are kept, at different times within said twelve months, the plaintiff may recover separate damages under each count.

TORT, under the Pub. Sts. c. 100, in five counts.

The first count alleged that the plaintiff was the wife of William J. Kennedy; that said William J. had the habit of drinking spirituous or intoxicating liquors to excess; that in September, 1884, the plaintiff gave notice in writing, signed by her, to the defendant, requesting him not to sell or deliver such liquor to said William J.; and that the defendant did sell or deliver such liquor to said William J. after the giving and receipt of said notice, and between the date of the receipt thereof and May 1, 1885, and within twelve months after the giving and receipt of such notice.

The second count was similar to the first, except that the date of the sale or delivery was alleged to be between May 1, and August 16, 1885.

The third count contained the same allegations as those in the first count; and alleged further, that, between the date of the giving of said notice and May 1, 1885, and within twelve months after the giving of such notice, the defendant permitted said William J. to loiter on the premises used by the defendant for the sale of said liquors.

The fourth count was similar to the third, except that the date of permitting said loitering was alleged to be between May 1 and August 16, 1885.

The fifth count alleged that, on August 15, 1885, said William J. became intoxicated from drinking spirituous or intoxicating



liquors sold or delivered to him by the defendant; and that, in consequence of said intoxication, the plaintiff was injured in person, property, and means of support.

Trial in the Superior Court, before *Pitman, J.*, who allowed a bill of exceptions, in substance as follows:

The defendant, during the time set forth in the declaration, held a license of the first class, to sell intoxicating liquors to be drunk on the premises, and also a common victualler's license.

The plaintiff testified that, some time in September, 1884, she gave the defendant a written notice signed by her, of which she retained no copy, the contents of which, as nearly as she could remember, (though she did not pretend to state precisely the language used,) were substantially as follows: "Dear Sir, — My husband has been in the habit of getting liquor here and coming home drunk. Now if you care anything for a wife and three children, I don't want you to give him any more drink; and if you do, I shall take means to protect myself." She also testified that the defendant read the notice, and said, "All right; I won't give him any." The plaintiff's husband also testified that, shortly after, the defendant told him that his wife had given him written notice not to sell him, the husband, any liquor, but that nevertheless he continued so to do.

No evidence was offered of the giving of any other written notice; and the evidence was conflicting whether any such notice was ever given by the plaintiff to the defendant.

The defendant asked the judge to instruct the jury as follows: "1. The written notice claimed to have been given by the plaintiff to the defendant was not a sufficient compliance with the provisions of the Pub. Sts. c. 100, § 25, and for that reason she cannot recover under the first four counts of her declaration. 2. The plaintiff is not entitled to recover two separate sums of money for loitering within the time set forth in her declaration; nor two separate sums for sales or deliveries within the time set forth therein."

The judge refused to give these instructions; and, upon the second point, instructed the jury that, if the evidence warranted it, they might find for the plaintiff, and assess damages for one sale within the time covered by each of the two counts respectively charging sales, and likewise for permitting loitering, on

other days than those of the sales, on one occasion within the time covered by each count charging this; but that the jury could only assess damages for a single occasion under each count.

The jury returned a verdict for the plaintiff, and assessed separate damages upon each count in her declaration. The defendant alleged exceptions.

*J. E. Cotter*, for the defendant.

*E. Greenhood*, for the plaintiff.

GARDNER, J. 1. The defendant contends that "the written notice claimed to have been given by the plaintiff to the defendant was not a sufficient compliance with the provisions of the Pub. Sts. c. 100, § 25." The defendant does not point out any defect in the notice claimed to have been given, nor any want of compliance therein with the requirements of the statute. The language of the statute is as follows: "The . . . wife . . . of a person who has or may hereafter have the habit of drinking spirituous or intoxicating liquor to excess may give notice in writing, signed by . . . her, to any person, requesting him not to sell or deliver such liquor to the person having such habit."

It is not necessary that the notice should be in the language of the statute. It is sufficient, if it conveys to the person notified, in clear and unmistakable terms, the substance of the requirement of the statute. The plaintiff was to give notice to the defendant in writing, signed by her, requesting him not to sell or deliver spirituous or intoxicating liquor to her husband, having the habit of drinking such liquor to excess. The notice actually given did not contain the words spirituous or intoxicating liquor. It stated that her husband "had been in the habit of getting liquor here and coming home drunk," and requested the defendant not to give him any more drink. The meaning was clear, and the defendant must have understood it. We think that the notice given was a sufficient compliance with the provisions of the statute.

2. The defendant contends that, under the statute, "the plaintiff is not entitled to recover two separate sums of money for loitering within the time set forth in her declaration; nor two separate sums for sales or deliveries within the time set

forth therein;" in other words, that the notice is exhausted by the recovery of one sum for loitering, or one sum for a sale or delivery of liquor; and that a new notice must be given before the plaintiff can again recover. The statute provides that, "if the person so notified, at any time within twelve months thereafter, sells or delivers any such liquor, . . . or permits such person to loiter on his premises, the person giving the notice" may recover, &c. We do not think that the Legislature intended to limit the right of action as is contended by the defendant. The words "at any time within twelve months thereafter," as used in the statute, empower the one who has given the notice to recover of the person notified for each sale or delivery of intoxicating liquor to the person having such habit, and for each time such person is permitted to loiter, &c., during the twelve months after the notice has been given. This interpretation of the statute carries out the purpose of its enactment. The Superior Court rightly refused to rule as requested by the defendant, and the instructions given to the jury were correct.

*Exceptions overruled.*

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JAMES B. CHURCH *vs.* JOSEPH FOWLE.

Suffolk. March 29. — May 8, 1886. W. ALLEN & HOLMES, JJ., absent.

If a promissory note is attested, before delivery, by a person not a party to it, without the procurement or knowledge of either party, and the note is accepted by the payee without any knowledge that it has been attested, and without relying upon the attestation as a part of the contract, the attestation is not such a material alteration as will make the note void, but may be stricken out; and an action may be maintained upon the note.

CONTRACT, upon the following instrument, purporting to be signed by the defendant, by his mark, and to be witnessed by A. W. Holway: "\$370.00. Boston, June 27, 1884. Borrowed and received of James B. Church three hundred and seventy dollars, which I promise to pay on demand with interest at six per cent per annum." The answer contained a general denial, and a denial of the defendant's signature; and further alleged

that, "if the plaintiff shall show that he did sign said contract, then the defendant says that he is an illiterate person and did not know that he signed said contract, and that his signature thereto was procured by fraud and misrepresentation, for that said contract was not the contract he agreed or intended to sign."

Trial in the Superior Court, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows:

Holway, the attesting witness to the note, testified that, at the date of the note, the plaintiff and defendant came to his store, and one of them requested him to make out a note to be signed by the defendant for \$370; that he then drew the note in suit, and, before it was signed, read it to the defendant; that the defendant said he could not write; and thereupon he wrote the name of the defendant thereon, and the defendant touched the pen while he made the mark. On cross-examination, he testified that neither the plaintiff nor the defendant requested him to witness the signature of the defendant; and that he did it of his own motion, and as a matter of course, because the defendant signed by mark, and he did not read the attestation to the defendant, or inform either the plaintiff or defendant that he had made such attestation.

The plaintiff testified that he and the defendant went to Holway's store, and he told Holway that he had agreed to lend the defendant \$370, and desired Holway to make out a note for the defendant to sign; that Holway made out the note in suit, and read it to the defendant, after which Holway signed the name of the defendant thereto, and the defendant touched the pen when the mark was made; and that he, the plaintiff, then let the defendant have the \$370. On cross-examination, the plaintiff testified that nothing was said by anybody about witnessing the signature of the defendant; and that he did not know of the attestation until some time after the note had been delivered to him by Holway.

It was further testified to, and not controverted, that the defendant could neither read nor write; and no evidence was offered tending to show that the defendant had any knowledge that Holway had signed his name on the note as a witness to the defendant's signature, except that Holway testified that he

signed his name as a witness at the time when the paper was signed by the defendant.

The defendant testified that the note in suit was not read to him, and that he did not sign it; that he was to have the money for two years without interest, and that, when he received the money, no paper was read to or signed by him.

The defendant requested the judge to rule as follows: "1. The insertion of the words, 'Witness, A. W. Holway,' in the body of the note in suit, after the defendant signed it, changed its terms and materially enlarged his liability upon it. 2. There is no evidence in this case which will warrant the jury in finding that the insertion of the words, 'Witness, A. W. Holway,' after the defendant signed the note in suit, was authorized by the defendant, and the court should order judgment for the defendant." The judge declined so to rule.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

*G. W. McConnell*, for the defendant.

*F. F. Fay*, for the plaintiff.

FIELD, J. The evidence was that Holway attested the note as a witness before it was delivered to the plaintiff, and that he did this, without the knowledge of either the plaintiff or defendant, "as a matter of course, because the defendant signed by mark;" and the argument is that this attestation materially enlarged the defendant's liability, because an action can be brought upon an attested note at any time within twenty years after the cause of action accrues, while, if the note is not attested, an action must be brought within six years. Pub. Sts. c. 197, §§ 1, 6, 7. If it be assumed that the effect of a witness attesting the signature of the maker of a note who signs by his mark is to bring the note within §§ 6 and 7 of this chapter of the Pub. Sts., that this is a material alteration, and that there is no such custom of witnessing such signatures that it can be considered that the defendant must be held to have authorized the attestation, yet the attestation was made before delivery, and was not made by the payee or by his procurement, and it was not an alteration of an existing contract. There is, indeed, no evidence that the attestation was made by Holway with any fraudulent intent, unless the fact that he made it is, under the

circumstances, evidence of a fraudulent intent; and Holway, in writing the note, was as much the agent of the defendant as of the plaintiff. Taking the case most favorably for the defendant, it is that of a material alteration of a note, by attesting it before delivery, by one not a party to it, without the procurement or knowledge of any party, the note being received and accepted by the payee without any knowledge that it had been attested, and without relying upon the attestation as a part of the contract. Such an alteration does not make the note void, but the alteration, being unauthorized and no part of the contract as understood or intended by either party, may be stricken out. *Nickerson v. Swett*, 135 Mass. 514. *Drum v. Drum*, 133 Mass. 566. See *Fay v. Smith*, 1 Allen, 477; *Adams v. Frye*, 8 Met. 103, 106; *Smith v. Dunham*, 8 Pick. 246.

*Exceptions overruled.*

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PAIGE R. COCHRANE vs. ISAAC B. RICH & another.

Suffolk. April 1. — May 8, 1886. W. ALLEN & HOLMES, JJ., absent.

An attaching creditor of personal property, who, after a demand by a mortgagee of the amount due him upon his mortgage, which includes said property and other articles exempt by law from attachment, tenders the amount due the mortgagee, cannot maintain a bill in equity to compel the mortgagee to assign the mortgage to him.

BILL IN EQUITY, against Isaac B. Rich and Lizzie S. McKenney, to obtain the assignment of a mortgage. The case was heard in the Superior Court by *Blodgett, J.*, who reported the case for the determination of this court, in substance as follows:

Certain household furniture, a part of which was exempt by law from attachment, had been attached in the house of the defendant McKenney, and the portion not exempt had been removed therefrom by the officer who made the attachment, on a writ in favor of the plaintiff; the defendant Rich held a mortgage covering all of said household furniture, and was ready to accept the amount tendered by the attaching creditor; and the only

question in controversy was whether the attaching creditor, by making such tender, was entitled to an assignment of the mortgage. The judge ruled that he was not entitled to such assignment, and dismissed the bill.

*H. L. Baker & G. E. Curry*, for the plaintiff.

*A. Russ*, for the defendants.

GARDNER, J. The right to make an attachment of mortgaged personal property is derived from the Pub. Sts. c. 161, §§ 74 & seq. At common law, a mortgagor's interest in such property could not be reached by attachment. *Badlam v. Tucker*, 1 Pick. 389. The statute points out the method in which such attachment can be made. It can be rendered effectual by the payment of the amount secured by the mortgage upon demand made. The statute treats the payment so made as a redemption of the property, and provides that the proceeds of the sale shall be first applied to repay the attaching creditor the amount paid by him to redeem the property. The purpose of the statute appears to be to redeem the goods and discharge the mortgage, so that the attachment may be effectual, inasmuch as the liens respectively created by mortgage and attachment on the same property are essentially different, and cannot coexist. *Evans v. Warren*, 122 Mass. 303.

If the mortgage should be assigned to the attaching creditor, he could not hold the mortgage and preserve his attachment. It would be necessary that one of the securities should yield. Either the lien upon the property secured by the mortgage would be void, or the lien by attachment would be void. The assignment therefore could not aid the creditor in securing his debt legitimately. But the statute has made no provision for such an assignment of the mortgage, and contemplates, not the survival of the mortgage, but its discharge. We see no reason in equity why the mortgage should be assigned to the attaching creditor.

*Bill dismissed.*

NATHAN D. ABBOTT vs. JOHN SHEPARD & others.

Suffolk. March 26. — May 10, 1886. W. ALLEN & HOLMES, JJ., absent.

In an action, by the assignee in insolvency of the estate of A., to recover the amount of certain promissory notes, alleged to have been transferred by A. to the defendant, in violation of the provisions of the insolvent law, it appeared that, about two months before the proceedings in insolvency were begun, A. sold his business to a third person, and, of the amount received therefor, transferred the greater part to the defendant, to whom A. was largely indebted. The plaintiff introduced evidence tending to show that A. had been connected in business with D.; that this firm failed in the previous year, and compromised with its creditors, including the defendant, for forty cents on the dollar; that A. began business again, and continued it until he sold out as above stated; that the defendant examined into the assets and liabilities of A. soon after he so started in business again, and ascertained his condition; and that A. was insolvent from the time of the failure of the firm of A. and D. until the proceedings in insolvency were begun against him. The defendant introduced evidence tending to show that A. was solvent when he began business again, and at the time of said transfer to the defendant; and that he had no reason to believe that A. was insolvent. The judge instructed the jury that the plaintiff must prove three things: first, that, at the time of the payment or transfer in question, A. was insolvent, or in contemplation of insolvency; secondly, that the payment or transfer in question was made with a view to give a preference to the defendant over other creditors; thirdly, that, at the time of the payment or transfer in question, the defendant had reasonable cause to believe that A. was then insolvent, or in contemplation of insolvency; and that, if those three propositions were established, then the verdict must be for the plaintiff. The defendant then requested the judge to instruct the jury that the plaintiff must also satisfy them that the defendant had reasonable cause to believe that the transfer of the notes was made in fraud of the laws relating to insolvency. This instruction the judge gave, but with the further instruction, that, if they found affirmatively established the three propositions before stated, that would authorize the finding that the transfer was in fraud of the insolvent law. *Held*, that the defendant had no ground of exception.

In an action, by the assignee in insolvency of the estate of A., to recover the amount of certain promissory notes alleged to have been transferred by A. to the defendant, in violation of the provisions of the insolvent law, the plaintiff introduced evidence tending to show that A. was at one time connected in business with D.; that the firm failed, and compromised with its creditors, of whom the defendant was one, by paying forty cents on the dollar; that A. began business again, and continued it for some time, when he sold out for a certain sum, the notes given for the greater part of which were transferred to the defendant, to whom he was largely indebted; and that A. was insolvent from the time of the failure of the firm of A. and D. until the date of the insolvency proceedings against him. The defendant called a witness, who testified that he was in the defendant's employ, and had charge of his accounts; and that, at about the time that A. and D. failed, he went to their place of business to look after their debt to the defendant. The defendant then asked him, "Do you



know whether there was any difficulty between D. and A. about that time that led to the failure?" *Held*, that the judge was justified, in his discretion, in excluding the question.

CONTRACT, with counts in tort, by the assignee in insolvency of the estate of Charles H. Abbott, to recover the amount of certain promissory notes, alleged to have been transferred to the defendants, in violation of the provisions of the insolvent law. Trial in the Superior Court, before *Mason, J.*, who allowed a bill of exceptions, in substance as follows:

It appeared that Charles H. Abbott was for some years engaged in the retail dry-goods business in Lowell; that about October 1, 1882, he sold his entire stock and fixtures to one Sharp, and received payment therefor as follows: \$1500 by check on October 3; \$9500 in two promissory notes of said Sharp, on October 25, 1882, for \$4500 and \$5000 respectively; and a check for \$1366.10, on November 2, 1882; that said two notes were indorsed by Abbott to the defendants on October 25, 1882, upon the understanding that they should give him back a part of the amount thereof; and that, on or about November 3, they gave him a check for \$925.71. At the time of the transfer of these notes to the defendants, Abbott owed them about \$9540.

Subsequently, proceedings in insolvency were begun against Abbott, on November 27, 1882, in which the plaintiff was appointed assignee of his estate.

The plaintiff introduced evidence tending to prove that Abbott, prior to 1881, was connected in business with one Dickinson, under the style of Abbott and Dickinson; that said firm failed early in the year 1881, and compromised with most of its creditors for forty cents on the dollar; that Abbott began business again in May, 1881, under the name of C. H. Abbott and Company, and continued to do business under that name until he sold out, in October, 1882; that the defendants were creditors of Abbott and Dickinson at the time of their failure in 1881, and settled with them for forty cents on the dollar, and gave them a release; that the defendants examined into the assets and liabilities of C. H. Abbott and Company soon after he started again in May, 1881, and ascertained his condition; and that he was insolvent from the time of the failure of Abbott

and Dickinson down to the date of the insolvency proceedings against him.

The defendants introduced evidence tending to prove that Abbott was solvent when he began business under the name of C. H. Abbott and Company, and at the time of the transfer of the notes to the defendants, for which the plaintiff sought to recover. They called, as a witness, Franklin A. Webster, who testified that he had been in their employ for a number of years, and had had charge of their accounts and credits; that he had known Abbott about twenty years; that, since he had been connected with the defendants, they had sold goods to Abbott and the different firms with which he had been connected, including Abbott and Dickinson, and C. H. Abbott and Company; that most of the information which the defendants had of their debtors came through him; that neither he nor the defendants had any reason to believe that Abbott was insolvent; that, at about the time that Abbott and Dickinson failed, he went to Lowell to look after their debt to the defendants. The defendants asked him the following question, which was excluded: "Do you know whether there was any difficulty between Dickinson and Abbott about that time that led to the failure?"

It was in evidence that the defendants' sales to C. H. Abbott and Company were under an agreement to give him credit for a large stock, and to give him extra time thereon, interest to be paid on the account after thirty days.

The judge instructed the jury, that the plaintiff must prove three things: first, that, at the time of the payment or transfer in question, Abbott was insolvent, or in contemplation of insolvency; secondly, that the payment or transfer in question was made with a view to give a preference to the defendants over other creditors; thirdly, that, at the time of the payment or transfer in question, the defendants had reasonable cause to believe that Abbott was then insolvent, or in contemplation of insolvency; and that, if these three propositions were established, then the verdict must be for the plaintiff.

The defendants then requested the judge to instruct the jury that the plaintiff must also satisfy them that the defendants had reasonable cause to believe that the transfer of the notes was made in fraud of the laws relating to insolvency. This

instruction the judge gave, but with the further instruction that, if they found affirmatively established the three propositions before stated, that would authorize the finding that the transfer was in fraud of the insolvent law.

The jury returned a verdict for the plaintiff in the sum of \$9937.59; and the defendants alleged exceptions.

*R. Stone*, for the defendants.

*R. D. Smith & M. R. Thomas*, for the plaintiff.

GARDNER, J. 1. The three several propositions stated by the judge in his charge to the jury were in accordance with the law relating to preferences under the insolvent act. Pub. Sts. c. 157, § 96. The presiding judge then added, that, if the jury found the first, second, and third propositions affirmatively established, "that would authorize the finding that the transfer was in fraud of the insolvent law;" in other words, would authorize the finding that the defendants had reasonable cause to believe that the transfer of the notes was made in fraud of the law relating to insolvency. The defendants object to this addition.

The bankrupt act of the United States had a similar provision in relation to preferences. U. S. St. March 2, 1867, § 35. Under this statute, it has been held that the words, that the creditor must have reasonable cause to believe that the transfer was made in fraud of the provisions of the bankrupt act, refer to reasonable cause to believe that the debtor intended a fraudulent preference. *Forbes v. Howe*, 102 Mass. 427. *Toof v. Martin*, 13 Wall. 40, 51.

If the defendants knew, or had reasonable ground to believe, that Abbott was insolvent, and if, with that knowledge, they took a large portion of his property to secure themselves, and if, at the same time, they knew that the law required that his property should be equally divided among his creditors, these facts would go far towards supporting the inference, that the defendants had reasonable cause to believe that Abbott intended that the transfer of these notes to them should be a fraudulent preference. *Forbes v. Howe*, *ubi supra*. This would follow as a necessary result from the facts stated. Upon the evidence in this case, if the three propositions stated to the jury were properly established, the jury had the right to infer therefrom that the defendants had reasonable cause to believe that Abbott intended

the transfer of the notes as a preference. Under the circumstances of this case, and upon the evidence reported, we think that the instructions given to the jury were correct. *Toof v. Martin, ubi supra.* It is possible to imagine cases where the facts might require further instructions, and where the jury would not be justified in drawing such inferences as in the case at bar.

2. The defendants offered evidence tending to show that a difficulty between Dickinson and Abbott led to their failure in 1881. The plaintiff had shown the failure of Abbott in 1881; and the defendants contended that the evidence excluded tended to show that the failure was not due to bad management of his business. We think that this testimony comes within the range of cases so near the line of remoteness and immateriality, that it is wiser to leave it to the discretionary control of the presiding judge, than to attempt to pass upon it as a question of law. It was, however, so remote that the judge was fully justified in excluding it.

*Exceptions overruled.*



## HANNAH SMITH vs. NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Suffolk. March 8. — May 11, 1886. W. ALLEN & HOLMES, JJ., absent.

A right of way by prescription cannot be acquired over a railroad, whose location runs through the land of the person claiming such right, while the railroad corporation neglects to comply with a decree of the county commissioners, under the Rev. Sts. c. 39, § 61, made upon the petition of such landowner, that the corporation give security for the payment of damages for the land taken, and no payment or settlement of such damages is made.

TORT for the obstruction of an alleged right of way across the defendant's railroad in that part of Boston formerly Dorchester. At the trial in the Superior Court, before *Bacon, J.*, the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

*J. L. Eldridge*, for the plaintiff.

*W. C. Loring & R. M. Saltonstall*, for the defendant.

DEVENS, J. The plaintiff's argument concedes that, as no right of crossing the defendant's railroad was reserved in the location made by the Boston and New York Central Railroad Company (to whose title the defendant has succeeded) nor ordered by the county commissioners, such rights as she or her predecessor in title had to this crossing were extinguished, unless they have since been reacquired by prescription. The location made in 1854 by the railroad corporation was of a strip five rods in width, running from north to south, through the land of one Wales, under whom the plaintiff claims, and cutting off his means of communication between the east and west portions of his estate except by crossing the railroad. The plaintiff offered evidence that Wales, from that time to 1865, when he died, and subsequently the plaintiff, his daughter, and other heirs, adversely and continuously had used the way across the railroad, which the defendant is now charged with obstructing; and that, when the crossing and planking of the road were out of order, these had, on his or their complaint, been repaired by the corporation.

At the trial, upon the request of the defendant, the presiding judge ruled that no adverse use of the crossing existing for the period of twenty years had been shown, and this for the reason that, from 1855 to 1864, no security had been given for the payment of damages by the Boston and New York Central Railroad Company, which had been ordered, nor had any payment or settlement of the damages been made; and thus that the right and authority of the corporation, during that time, to enter upon and use said land ceased, except for the purpose of making surveys, by reason of the statutory provision applicable to such a case.

That any user of such a crossing must be adverse to the right, real or supposed, of the railroad corporation in order to afford ground for a prescriptive title, cannot be controverted. If the possession of a parcel of real estate, or user of an easement therein, as of a right of way over it, can be accounted for consistently with the rights of one having the title thereto, no presumption arises in favor of the possessor as against such person. The presumption arises from the difficulty or impossibility of accounting for the possession or user, except by assuming that a

grant or other conveyance from the original owner conferring the right is in existence. If Wales himself, therefore, was rightfully, by reason of his original title, in possession and occupation of this way from 1854 to 1865, he would gain no title thereby, as against the defendant, as such possession is referred to his own title, and was not adverse to that of the railroad corporation, but was consistent with its rights, whatever those might be.

On December 28, 1854, Wales petitioned the county commissioners that the railroad should be compelled to give security for damages for taking his land, alleging, as one of his grounds of damage, the cutting off his rights of way. Upon this petition, a decree was made, ordering the company to give security in the sum of \$4000, which requirement was wholly neglected. The Rev. Sts. c. 39, § 61, were then in force, which, after providing for an application similar to that made by Wales, and for the order thereon, conclude by adding, that "all the right or authority of said corporation to enter upon or use said land or other property, except for making surveys, shall be suspended until they shall give such security." The effect of this order, and of the non-compliance therewith, was to entitle Wales at once to the possession of this land, and to deprive the corporation of the right to the use thereof. This possession continued in Wales until May 21, 1864, when he made a settlement of his damages with the railroad corporation which had succeeded to the rights of the Boston and New York Central Railroad Company. While Wales was entitled to possession, and was lawfully in possession, it cannot be said that this was not by virtue of his lawful right. During this period, the corporation was permitted to make use, to a greater or less extent, of the railroad location, but, in so doing, the corporation was acting by his permission. That which he did was not done by its permission, or in assertion of any adverse right. It could not object to his use of this way, while he was entitled to restrain its use of its railroad, if he had so desired. A non-appearing grant or a prescription is not to be presumed when title is shown to which Wales's use and enjoyment of this way can be ascribed. *Atkins v. Bordman*, 20 Pick. 291, 302; *S. C.* 2 Met. 457, 465. *Drake v. Curtis*, 1 Cush. 395, 416.

Where a street was laid out, but not ordered to be completed nor any act done equivalent thereto, which was necessary under the right given to the town of Boston in the laying out of streets in South Boston, in order to make its title perfect, it was held that there could be no adverse possession by the landowner, as his possession was perfectly consistent with the rights of the town. *Henshaw v. Hunting*, 1 Gray, 203, 218. *Arnold v. Stevens*, 24 Pick. 106.

The plaintiff contends that Wales waived the security to which he was entitled. If he did so, it was only to the extent to which he permitted the railroad to use the land. He did not waive his right to use this crossing. He certainly could not have been sued in trespass by the railroad corporation for crossing the railroad, because he permitted it to use the road. His permission to the corporation went no further than those acts which he allowed, nor had he waived or surrendered his right to do that which he actually did. *Exceptions overruled.*

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### MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS *vs.* CITY OF BOSTON.

Suffolk. March 10. — May 11, 1886. MORTON, C. J., did not sit.  
W. ALLEN & HOLMES, JJ., absent.

By the St. of 1868, c. 81, certain persons were incorporated as the "Massachusetts Society for the Prevention of Cruelty to Animals;" but the objects and purposes were not defined otherwise than by the title of the act. By the St. of 1868, c. 212, § 8, reenacted in the St. of 1869, c. 844, § 7, all fines collected upon the complaint or information of any officer or agent of the corporation under that statute are to be paid over to the corporation "in aid of the benevolent objects for which it was incorporated." The methods adopted by the corporation are the gratuitous dissemination of papers and essays, and the delivery of free lectures, setting forth the proper treatment of animals; the organization of societies whose members are pledged to the prevention of cruelty to animals; the employment of agents to aid in enforcing the laws upon the subject; and the erection and maintenance of a free hospital for homeless, neglected, diseased, or abused animals, where they may be kindly cared for or humanely disposed of. *Held*, that the corporation was a "benevolent" and "charitable" institution, within the Pub. Sta. c. 11, § 5, c. 3, exempting the property of such institutions from taxation.

CONTRACT to recover the amount of a tax assessed upon real estate of the plaintiff for the year 1884, and paid under protest. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, in substance as follows:

On May 1, 1884, the plaintiff corporation owned about an acre of land situated in Boston, which was acquired by it on May 29, 1883, for the purpose of erecting and maintaining a free hospital or sheltering home for homeless, neglected, diseased, or abused animals, where they might be kindly cared for or humanely disposed of. With money given it for the same purpose, it commenced later on in the same year, as soon as the necessary plans and arrangements could be made, the erection of the buildings aforesaid. On May 1, 1884, the work of erecting these buildings had been and was being diligently prosecuted by the corporation. The real estate was worth about \$10,000, and on May 1, 1884, was all the real estate owned by the corporation, and was all for the use of the hospital, and necessary therefor, and intended for no other purpose.

On May 1, 1884, the defendant city assessed to the plaintiff upon said real estate a tax for the year 1884 of \$193.80, which, with the interest and costs, amounting to \$3.48, the plaintiff paid to said defendant, after summons, upon written protest, and was the whole tax assessed to the corporation by the defendant for that year.

The plaintiff was incorporated by the St. of 1868, *c.* 81. Its purpose, as set forth in its constitution, is "to provide effective means for the prevention of cruelty to animals, throughout the Commonwealth and elsewhere." The members of the society do not derive any pecuniary benefit from their membership, but all the means of said society are expended in furthering the purpose aforesaid.

The plaintiff employs agents who devote their time and attention to the prosecution of persons found treating animals contrary to the laws of the Commonwealth.

The plaintiff prints and circulates gratuitously about one hundred thousand copies annually of a paper entitled "Our Dumb Animals," devoted to setting forth proper treatment of animals, and inciting its readers, by illustration and argument,



to such treatment; and has printed and distributed gratuitously about two hundred thousand copies of essays upon different subjects, treating of methods for the proper and humane treatment of animals under all conditions.

The plaintiff has, by its officers and agents, delivered many free addresses, and given much personal advice on subjects connected with the humane and proper treatment of animals; and has awarded prizes for inventions for the relief of animals from suffering, and keeps specimens and models of such inventions on exhibition, but does not deal in or sell any such articles.

The plaintiff, at the centennial exhibition in Philadelphia, in 1876, secured a space in said exhibition, and exhibited a great number of models and specimens of the above inventions; and has, by its officers, organized about five thousand associations, which have about three hundred thousand members pledged to the prevention of cruelty to animals.

The plaintiff, on June 27, 1884, duly filed with the assessors of the defendant city, in full accordance with the requirements of the St. of 1882, c. 217, a true list of all the real and personal estate held by it on the first day of May, 1884, for literary, benevolent, charitable, or scientific purposes, and also a true statement of the amounts of all receipts and expenditures by it for said purposes during the year next preceding said first day of May; said list and statement being in such detail as was required by the tax commissioner.

*F. Brewster*, for the plaintiff.

*A. J. Bailey*, for the defendant.

DEVENS, J. As the plaintiff paid the tax assessed upon its real estate under such circumstances that it is entitled to recover it back if wrongfully assessed, the only question is whether the plaintiff corporation is one of the institutions described in the Pub. Sts. c. 11, § 5, cl. 3, as "literary, benevolent, charitable, and scientific institutions incorporated within this Commonwealth." The institution was incorporated by the St. of 1868, c. 81, by the name of the Massachusetts Society for the Prevention of Cruelty to Animals. Its objects and purposes were not more specifically defined than by its title, nor was any mode of accomplishing them pointed out. The methods adopted, by the dissemination of papers and essays, by lectures

inculcating not only the duty of humanity to, but the proper mode of dealing with and treating, the domestic animals and their diseases, by organizing societies of members pledged to aid in the prevention of cruelty to them, and by the employment of agents to aid in enforcing the laws on this subject, are legitimate means of effecting the general object indicated by its name. The society is also engaged in erecting and maintaining a hospital for homeless, neglected, and abused animals, where they may be kindly sheltered or humanely disposed of, which is also an appropriate mode of aiding in the prevention of cruelty to them. The act of incorporation must have contemplated all the legitimate and appropriate means of effecting this object, which were of a general character, and capable of influencing the public.

The society may be properly defined as both benevolent and charitable. By the St. of 1868, c. 212, § 8, all fines collected upon "the complaint or information of any officer or agent of the Massachusetts Society for the Prevention of Cruelty to Animals, under this act, shall inure and be paid over to said society in aid of the benevolent objects for which it was incorporated." The same section is reenacted in the St. of 1869, c. 344, § 7. In terms, therefore, the Legislature has recognized the objects of the society as "benevolent."

Without discussing the question whether the word "benevolent" is used as substantially synonymous with "charitable," or disjunctively, we are of opinion that the society also comes within the definition of a charity. There is no profit or pecuniary benefit in it for any of its members; its work, in the education of mankind in the proper treatment of domestic animals, is instruction in one of the duties incumbent on us as human beings. There are charitable societies whose objects are to bring mankind under the influences of humanity, education, and religion. *Jackson v. Phillips*, 14 Allen, 539. The hospital founded by the institution would, if it were established by a bequest, or public or private gift, be treated as a charity. It has a humane, legal, and public, or general purpose, and whether expressed or not in the St. of 43 Eliz. c. 4, which is the foundation of our law on the subject of charities, comes within the equity of that statute. *Cresson's appeal*, 30 Penn. St. 437.

*Townley v. Bedwell*, 6 Ves. 194. *Faversham v. Ryder*, 5 De G., M. & G. 350.

In the case of *University of London v. Yarrow*, 23 Beav. 159, it was held that a bequest for founding and upholding an institution for investigating, studying, and curing maladies of quadrupeds or birds useful to man, and for providing a superintendent or professor to give free lectures to the public, was good as a charitable legacy; and that the fact that the testator showed some interest in the animals themselves and their humane treatment in no way invalidated the gift.

The argument for the defendant is, that the passage of the general provision of the Rev. Sts. c. 7, § 5, cl. 2, reenacted in the Pub. Sts. c. 11, § 5, was intended to extend the exemption to the whole of the same class of institutions of which a portion was then exempted, and no further; and that the words "benevolent" and "charitable" must be construed as meaning benevolent and charitable in respect to human beings, such being the only kind incorporated in this Commonwealth before the Revised Statutes.\* But the intention of the statute was to extend the exemptions which then existed to all societies which are properly described by the words used, and an institution must be deemed both benevolent and charitable which educates men in the diseases of the domestic animals, and the proper mode of dealing with them, even if it also inculcates the duty of kindness and humanity to them, and provides appropriate means of discharging it.

*Judgment affirmed.*

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\* The commissioners on the revision of 1836 proposed to exempt the property of the Massachusetts General Hospital, the Boston Athenæum, the Berkshire Medical Institution, Harvard College, Phillips Academy in Andover, and every academy incorporated under the authority of this Commonwealth.

## JOSEPH NASH vs. JOHN LATHROP.

Suffolk. March 10, 11. — May 11, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

Before 1874, the statutes of the Commonwealth provided for the appointment of a reporter of the decisions of the Supreme Judicial Court, who was required to be sworn to the faithful performance of his duties. The manner in which the decisions were to be reported, and the time in which they were to be published, were also prescribed. He was paid a salary by the State, and given "the profits arising from the publication of his reports." By the St. of 1874, c. 43, the reporter was required to keep in a public office the written opinions of the court in all cases argued, until their publication in the reports, and also his dockets and copies of papers in such cases, and to "afford due facilities for their examination." By the St. of 1879, c. 230, the Secretary of the Commonwealth was directed to enter into a contract with A. for the publication of the reports, the statute specifying the size, style, and form of the volume, obliging the publisher to sell at a certain price to the public in this State, and at a certain less price to the State, and to pay the reporter a salary. The statute further provided, that the reporter should not be required or allowed to publish the reports; and that the stereotype plates and copyright of the volumes published should be the property of A. *Held*, that A. had no right, under a contract entered into with the Commonwealth in pursuance of the statute, to the first publication of the opinions of the court; and that any one, although not a citizen of the State, had a right to require the reporter to allow copies of such opinions to be made for the purpose of publication.

PETITION for a writ of mandamus to compel the reporter of decisions of this court to allow the petitioner, the publisher of the *Daily Law Record*, a daily paper devoted to legal intelligence, to examine, and, for the purpose of publication, take copies of the opinions of the court which are in the custody of the respondent as reporter.

The answer averred, that, by the Pub. Sts. c. 159, § 61, the respondent was bound to keep in some safe and convenient place in Boston the written opinions of the court in all law cases argued in the several counties, until their publication in the reports, and also his own dockets and copies of papers in such cases, and to afford due facilities for their examination; that he had fully complied with the said statute, and had always furnished and was ready to furnish such facilities; but that this statute did not give the right to take copies or abstracts for publication.

The answer further averred, that by virtue of the St. of 1879, c. 280, and of a contract made in pursuance thereof, and by virtue of the extension of said contract duly made at the expiration thereof in 1884, Little, Brown, and Company had the exclusive right of publication of the reports of the decisions of the Supreme Judicial Court; that the respondent had no right to publish the same, or to furnish the same to others for publication, without the assent of said Little, Brown, and Company; that heretofore the petitioner had been permitted by the respondent, with the assent of said Little, Brown, and Company, to take abstracts of opinions, from time to time, for publication, but that recently the West Publishing Company of St. Paul, Minnesota, and the Lawyers' Coöperative Publishing Company of New York, and other foreign publishers, had availed themselves of the liberty thus granted the petitioner to publish the decisions of this court in the form of reports for sale to the profession, in competition with the authorized series of reports and to the injury of said Little, Brown, and Company, and to the prejudice of the rights secured them by said contract and statute; and that for this reason, at the request of said Little, Brown, and Company, he had refused, and contended that he was bound to refuse, the petitioner the privilege of copying and abstracting opinions for publication.

Annexed to the answer was a copy of the contract therein referred to, executed by the Commonwealth of Massachusetts and by Little, Brown, and Company, on May 1, 1879, which followed the language of the St. of 1879, c. 280, with this exception: that while the statute provides that "the reporter of decisions of the Supreme Judicial Court shall not be required or allowed to publish the reports thereof, but shall prepare and furnish the same to said Little, Brown, and Company seasonably for publication," by the terms of the contract the Commonwealth covenanted that the reporter should prepare and furnish the reports to Little, Brown, and Company, seasonably for publication, and should "not publish, or furnish for publication, any reports of said decisions in any other manner."

The case was heard by *Devens, J.*, who found that the statements in the answer were true; that there were two corporations located beyond the Commonwealth, the West Publishing Company and the Lawyers' Coöperative Publishing Company, which

were interested in the procuring of these opinions for publication in the form of weekly reports, and that the petition was in the interest of these corporations as well as of the petitioner, and was for the purpose of enabling the petitioner, and the said corporations through the petitioner, to obtain the opinions; and that the publication of these reports in the form of daily or weekly publications would tend to injure the value of the regular reports to the publishers thereof.

It was agreed that, if mandamus should issue, it should be peremptory. The judge reserved for the opinion of the full court the question whether such mandamus should issue.

*A. Russ & R. R. Bishop*, (*A. M. Howe & G. T. Lincoln* with them,) for the petitioner.

*W. G. Russell & G. Putnam*, for the respondent. 1. If necessary to the decision of this case, it may well be contended that the Commonwealth may copyright or permit a publisher to copyright the opinions of its judges given in the course of their employment. *Gould v. Banks*, 53 Conn. 415. *Drone on Copyright*, 161, 239, 243. *Copinger on Copyright*, 126. *Shortt's Law of Literature*, 54.

In England, in early times, the King was accustomed to grant a patent giving the exclusive right to publish books of law. This right of the patentee appears to have been founded on the King's ownership, and on the fact that the judges were paid by him, as well as on his prerogative. *Millar v. Taylor*, 4 Burr. 2305. *Roper v. Streater*, Skin. 234. *Stationers v. Seymour*, 1 Mod. 256, 258. See *Gurney v. Longman*, 13 Ves. 493; *Drone on Copyright*, 161.

When the King ceased to issue law patents, no doubt seems to have been entertained that the copyrights of the reporters covered the opinions as reported by them. *Butterworth v. Robinson*, 5 Ves. 709. *Saunders v. Smith*, 3 Myl. & Cr. 711.

2. The words in the contract, "or furnish for publication," do not add to the significance of the word "publish," contained in the statute. To furnish for publication is a mode of publishing, — perhaps the only mode open to the reporter, who may fairly be presumed not to be himself a publisher.

3. Whether the Commonwealth has a right of copyright in the opinions of its judges or not, it has undoubtedly the right to

make suitable regulations for the publication of such opinions. Such regulations have been made in this State, for the purpose of securing accurate reports of the decisions of the court; and it is submitted that, under the regulations made, Little, Brown, and Company have the right of the first publication of these decisions.

From an early date, the Commonwealth has prescribed the manner in which the opinions should be published and the reports should be made.

By the St. of 1803, *c.* 133, it was provided that the Governor should appoint some suitable person learned in the law to be the reporter of decisions of the Supreme Judicial Court. He was required to be sworn to the faithful discharge of his duty. He was required to obtain "true and authentic reports of the decisions," and to "annually publish the same." His compensation was a salary paid him by the Commonwealth, "together with the profits arising from the publication of his said reports."

Until the passage of the St. of 1879, *c.* 280, the reporter made his own arrangements with his publishers, and owned or sold the copyright of his volumes, and depended for his compensation almost wholly on the profits of his sales.

Down to 1874, the reporter, as custodian of the papers and opinions in the decided cases, kept them at his private office or his house; and no one had access to them, except by his courtesy. The St. of 1874, *c.* 43, was passed to meet the inconvenience occasioned by want of access to the papers in cases decided, but not published. It required the county of Suffolk to furnish a "safe and convenient place" in Boston where the reporter should keep the opinions and other papers, in cases decided in all the counties, "until their publication in the reports," and to "afford due facilities for their examination." It was not desired or expected that the opinions should be published by any one but the reporter, nor in advance of his publication. The evil to be dealt with was the difficulty of knowing the decisions before publication, and the statute was exactly adapted to meet that difficulty. It provided for a fit place for custody of the opinions, and due facilities for their examination. The reporter continued after, as well as before, the St. of 1874, to copyright and publish

the reports. His compensation was unchanged, and was, as before, mainly derived from the profits of sales. If it had been intended to deprive him of the advantage of the right of first publication, which he then enjoyed, and the enjoyment of which was his principal inducement to do the work of his office, some clear language would have been used to express that purpose. To say that he should afford "facilities for examination" does not express any such purpose.

In 1879, the system of publication was changed. The reporter was no longer to own the reports, and obtain his compensation by negotiating with a publisher, who should sell the reports at as high a price as he could get. The State was to contract with a publisher, who should furnish the reports to its citizens at a fixed rate, and pay the reporter a salary. St. 1879, c. 280. The obvious motive for this change was the securing of the reports at a cheaper rate, both to the State and to its citizens.

The statute required the publication by Little, Brown, and Company, promptly and within the time required by law; which by the Gen. Sts. c. 121, § 52, then in force, was to be within ninety days after the first day of September in each year. It fixed the size, style, and form of the volume, and the price. It forbade the reporter publishing the reports. It required Little, Brown, and Company to pay the reporter a large salary; and, as the only compensation to the publishers, provided that "the stereotype plates and copyright of the volumes published under said contract shall be the property of said firm."

The method contemplated by the statute was a contract with publishers, who alone were to have the right to publish, and who were, in consideration of that right, to sell the reports at a low price. The Legislature meant to secure the lowest possible price. It could only secure that price by giving exclusive rights; and it used language intended and adapted to give such rights. The value of the right of publication would be seriously impaired, if not destroyed, if it did not involve the right of first publication; and the prohibition to the reporter against publication would be worthless, unless it extended to the furnishing for publication to others. These provisions of the statutes are still in force. Pub. Sts. c. 159, §§ 56-63.



The manner in which the cases are to be reported is also provided for. Pub. Sts. c. 159, §§ 57, 58. Only "legal questions argued by counsel" are to be reported; and the cases are to be reported, at the "discretion" of the reporter, "more or less at large, according to their relative importance, so as not unnecessarily to increase the size or number of the volumes of reports."

In every particular, therefore, the Legislature has regulated the manner in which the decisions of its highest tribunal shall be promulgated. The rights of the public before publication are carefully limited to the right of examination. See *Gould v. Banks*, *ubi supra*.

4. It is argued, that it is in accordance with public policy that the public should have information, as soon as possible, of what the court has decided, and that this can be attained only by permitting the petitioner, and those in whose interest he is acting, to publish the opinions in their various periodicals. It is, however, far more important that the reports should be "true and authentic," and should be made by a responsible person, over whom the State has control, and whose work is subject to the supervision of the court. On this subject the Legislature has spoken, and has fixed the time in which the reports shall be published.

5. Some reliance is placed by the petitioner on the fact that by § 3 of the St. of 1879, c. 280, the reporter is required to pay all sums of money received by him for copies of opinions to the treasurer of the Commonwealth. No statute, however, requires him to make such copies, and it is obvious that, if he were required to furnish copies of opinions to all who desired them, he would, if he personally made them, be prevented from performing the main duties of his office, and, if he employed a clerk to make them, it would entail a large expense upon him. This section was doubtless passed with knowledge of the practice of the office, which existed at the time of the passage of the act, of furnishing copies of opinions to those lawyers who could not conveniently personally examine them, charging a fee therefor. Such copies have been furnished for private use, and not for publication.

MORTON, C. J. [After a statement of the facts of the case.]  
The questions whether the Commonwealth has an absolute

property in the opinions of the justices after they are filed with the reporter of decisions, whether it has a copyright in such opinions which it can exercise itself or assign to an individual, and whether a copyright on the volumes of the reports covers such opinions, so as to prevent any person from publishing them after they have been published in the volumes of the reports, are not necessarily involved in this case.

It may be decided upon a narrower question, which is, whether the Commonwealth has granted to Little, Brown, and Company the exclusive right of the first publication of the opinions of the justices; in other words, whether it has conferred upon that firm the power of saying that such opinions shall not be made public until they are published in their reports.

✓ The decisions and opinions of the justices are the authorized expositions and interpretations of the laws which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the Legislature. ✕

It can hardly be contended that it would be within the constitutional power of the Legislature to enact that the statutes and opinions should not be made known to the public. It is its duty to provide for promulgating them. While it has the power to pass reasonable and wholesome laws regulating the mode of promulgating them, so as to secure accuracy and to give authority to them, we are not called upon to consider what is the extent or the limitation of this power; because we are satisfied that it was not the intention of the Legislature in the statute upon which the respondent relies to limit the previously existing right of the citizen to have free access to the opinions, or to confer upon Little, Brown, and Company the right to restrain any persons from procuring copies of them, whether for their own use or for publication in the newspapers or in law magazines or

papers. X The policy of the Commonwealth always has been, that the opinions of the justices, after they are delivered, belong to the public. X

The office of reporter of decisions was first established by the St. of 1803, c. 133. His duties were to obtain true and authentic reports of the decisions of the Supreme Judicial Court, and to publish them annually. He was paid a salary by the Commonwealth; "which, together with the profits arising from the publication of his said reports, shall be full compensation for his services."

These provisions, with a change in the amount of the salary, were continued through the two revisions of the laws, until 1879. At first the practice of the justices was to deliver their opinions orally, and the reporter took minutes for his reports. But these opinions were public, and any person present might take minutes and publish them. The statutes did not provide, and no claim was ever made, that the reporter had an exclusive right to the first publication. In later times the practice has been for the justices to write out their opinions\* and file them with the reporter, though it occasionally happens that opinions are delivered orally from the bench, and minutes taken by the reporter for his reports. But it has always been customary for the reporter to allow the public free access to the opinions, and to furnish copies upon receiving a reasonable compensation. Up to 1874 no public office was provided for the reporter, but he was obliged to keep his papers at his private office, or at his house. In that year, owing undoubtedly to the difficulty felt by the public in the exercise of the right to examine the opinions of the justices, the Legislature passed a statute, entitled "An act to provide for the custody and examination of the opinions of the Supreme Judicial Court before their publication in the reports." St. 1874, c. 43.

It provided that the reporter shall keep in some safe and convenient place, to be provided by the county of Suffolk, in the city

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\* The first statute which refers to an opinion in writing is the St. of 1826, c. 51, § 2, which provides that, whenever a decision shall be made by the court in the absence of the reporter, "it shall be the duty of the court to communicate such decision to him in writing, the better to enable him to comply with the provisions of law in this behalf enacted."

of Boston, the written opinions of the court in all law cases argued in the several counties, until their publication in the reports, and also his dockets and copies of papers in such cases, and shall afford due facilities for their examination. This statute is a clear recognition of the common right to the knowledge of the opinions of the justices, the object of its enactment being to furnish additional facilities for the exercise of this right.

This statute was in substance reenacted in the revision of 1882, and is now in force. Pub. Sts. c. 159, § 61.

It is in view of this course of legislation, and of this established policy of the Commonwealth, that we must construe the St. of 1879, c. 280, upon which the respondent relies. It provides that the Secretary of the Commonwealth shall make a contract with Little, Brown, and Company for the publication of the reports upon the terms therein contained. By the first section, that firm is to publish the reports promptly, according to a standard therein fixed, to sell them for a fixed price, and to pay the reporter a salary for and towards his compensation and clerk hire. The second section provides that during the term of the contract "the reporter of decisions of the Supreme Judicial Court shall not be required or allowed to publish the reports thereof, but shall prepare and furnish the same to said Little, Brown, and Company seasonably for publication according to said contract," and "the stereotype plates and copyright of the volumes published under said contract shall be the property of said firm." The third section provides that "all sums of money received by the reporter for the copies of opinions, rescripts, and other papers shall be paid over by him quarterly to the Treasurer of the Commonwealth, with a detailed statement of the same."

The contract made in pursuance of the statute contains the provision that the "reporter shall not publish or furnish for publication any reports of said decisions in any other manner," differing from the statute by the addition of the words "or furnish for publication." We do not think that these words add anything to the meaning of the contract. It was understood to be made to carry out the statute. But if the added words are beyond the scope of the statute, and give any right not authorized by it, they are beyond the authority conferred upon the

Secretary, and can have no effect. The respondent does not otherwise contend. We must, therefore, look to the statute only to determine whether the respondent has the right which he claims in his answer.

The purpose of the statute was to make provision for the prompt publication of the series of official reports known as the "Massachusetts Reports," at a reasonable price. The first and second sections look solely to this purpose, and deal with no other subject. They do not in terms confer upon Little, Brown, and Company the power to interfere with the public and common right to examine and procure copies of the opinions of the justices, and they do not, upon any reasonable construction, confer such a power by implication.

The provisions that the reporter, during the term of the contract, "shall not be required or allowed to publish the reports," and that the "copyright of the volumes published under said contract shall be the property of said firm," were necessary to define clearly the rights of the firm and the duties of the reporter. Under the previous laws the reporter was obliged to publish the reports, and he had the copyright in the volumes to his own use. The provisions in question were needed to repeal the existing laws, and to carry out the scheme of the new law. But the Legislature did not attempt to determine whether the copyright covered the opinions of the justices.

The intent of the statute was, that Little, Brown, and Company should have the right of publishing, and the copyright in, the volumes of the reports which had before vested in the reporter. The words "to publish the reports," in the second section, are manifestly used in the same sense in which the same words are used in the first section, and refer to the issue to the public of the "Massachusetts Reports." It would be a strained construction to hold that they were intended to prohibit the reporter from allowing the public the right to examine the opinions, or to procure copies or abstracts.

The third section, providing that the reporter shall account to the State for all sums of money received for copies, tends to show that the Legislature expected that the immemorial custom of furnishing copies to the public would be continued. The construction contended for by the respondent is in deroga-

tion of the rights of the public, and ought not to be adopted unless such was clearly the intention of the Legislature. It was its intention, without doubt, that Little, Brown, and Company should have the exclusive right of publishing the authorized series of Massachusetts Reports; but we cannot see in the statute any intention to give to that firm the right to suppress and keep from the public the opinions of the justices until they should print them in the reports. We are therefore of opinion that the claim of the respondent cannot be sustained.

Similar questions have arisen in several cases in other jurisdictions. While such cases have not the weight of authorities, because each case depends in some measure upon the statute of the State in which it arose, differing from our statute, yet the general current of the cases supports the principles upon which our decision rests. See *Banks v. Manchester*, 23 Fed. Rep. 143; *Myers v. Callaghan*, 20 Fed. Rep. 441; *Chase v. Sanborn*, 4 Cliff. 306; *Little v. Gould*, 2 Blatchf. 165; *Banks v. West Publishing Co.* 27 Fed. Rep. 50.

In order to prevent misconstruction, we desire to add, that, while it is the duty of the reporter to allow the public free access to the opinions in his custody, he has the right to make such reasonable regulations as to the method of examining and obtaining copies of them as he may deem necessary to secure the safety of his papers and the orderly administration of the affairs of his office.

*Mandamus to issue.*

## ATTORNEY GENERAL vs. FITCHBURG RAILROAD COMPANY.

Suffolk. March 22. — May 11, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

Under the St. of 1881, c. 230, the manager of the Troy and Greenfield Railroad and Hoosac Tunnel has no power, for the purpose of saving expense to the Commonwealth, to make an order which violates a contract entered into, under the St. of 1880, c. 261, between said manager and a certain railroad corporation, by the terms of which the corporation is entitled to charge the Commonwealth for the number of miles run by the switching engines of the corporation upon the first-named railroad.

COMPLAINT, under the St. of 1881, c. 230, § 4,\* in behalf of the manager of the Troy and Greenfield Railroad and Hoosac Tunnel, for an injunction to restrain the defendant from violating the following order, made by said manager, and dated June 30, 1885: "On and after July 1, cars for stations east of East Deerfield are not to be switched into station order at North Adams."

The case was heard by *Devens*, J., and reserved for the consideration of the full court; such decree to be entered as law and justice might require. The facts appear in the opinion.

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\* Section 1 of this act provides that "the manager of the Troy and Greenfield Railroad and Hoosac Tunnel is authorized to make and enforce all needful rules for the operation thereof, including the operation of the yard at North Adams, and also including rules as to the circumstances which shall constitute delivery of freight and freight cars from one railroad company to another at said yard. And he shall have the power to operate said yard, including the shifting of cars therein, and to hire men and locomotive power therefor, and in case of necessity he may use the locomotive power of any operating railroad company therefor."

Section 2 provides that, "if any of the companies operating said road shall object to any of said rules, the question shall be decided at once by the board of railroad commissioners."

Section 4 provides that, "if either of said operating companies shall refuse or neglect to comply with any rule made by the manager, he may in addition to his other remedies apply to the Attorney General, who may in his behalf make complaint before any justice of the Supreme Judicial Court, in term time or vacation, and said justice shall have power in a summary manner to hear the complaint and to enforce his decision thereon by injunction or by any other fit decree. And the decision of said justice, pending appeal or exceptions, shall remain in full force."

*H. N. Shepard*, Assistant Attorney General, for the plaintiff.

*G. A. Torrey*, for the defendant.

DEVENS, J. The St. of 1881, c. 230, § 1, in empowering the manager of the Troy and Greenfield Railroad and Hoosac Tunnel to make and enforce all needful rules "for the operation thereof, including the operation of the yard at North Adams," may well be interpreted as investing him with the power to make them consistently with the contracts already in existence as to the management and operation of said road or yard, so far as the parties entitled to the benefit of such contracts are concerned. There are expressions in it which might perhaps suggest a different construction; and, as the defendant contends that the regulation or order passed by the manager, which has been approved by the railroad commissioners, is one which seeks to impair the obligation of a contract already in existence between it and the Commonwealth, we proceed to consider whether such is its effect.

The Commonwealth occupies a double relation to the Troy and Greenfield Railroad and Hoosac Tunnel. It is the owner of property which it may deal with as private persons may in regard to their property, making contracts, and being held to all the lawful obligations concerning such property, even if such obligations cannot always be enforced against it by suit or legal process. The Commonwealth is also the sovereign. Under the Constitution of the United States, it cannot, as such, annul, alter, or impair the obligation of a contract, which, as the owner of property, it has lawfully made. But it has not, by making any contract as to its property, parted with its power of making all proper laws for the government of its citizens and for their welfare and safety. Even if by these the operations of contracts may be incidentally affected, and new and more onerous duties imposed on contracting parties, such laws are not necessarily unconstitutional. *New Orleans Gas Co. v. Louisiana Light Co.* 115 U. S. 650.

By virtue of the St. of 1880, c. 261, a contract was entered into on August 14, 1880, between the then manager of the railroad, who was legally authorized so to contract under direction of the Governor and Council, and the Fitchburg Railroad Company, under and by virtue of which the defendant has ever since



been, and is now, operating, with other corporations, the portion of the road of the Troy and Greenfield Railroad and Hoosac Tunnel which is between the stations at North Adams and Greenfield. Of this road the yard at North Adams is a part. The same statute provided "that no such contract shall be made which shall preclude the use of said railroad and tunnel by other railroad corporations whose roads connect therewith," and other corporations in fact use said yard and operate portions of said Troy and Greenfield Railroad under similar contracts. The third section of the same statute authorized the contracts to be made "with connecting railroads for the purpose of constituting through lines."

That the contract made with the defendant as to the use, management, &c. of the road of the Troy and Greenfield Railroad and Hoosac Tunnel was intended, under the authority of the statute, to make of the railroads thus connected a through line from North Adams to Boston, is established by an examination of its various details. If this is so, it was contemplated that the operation and use of the Troy and Greenfield Railroad and Hoosac Tunnel would rightfully be that which would be proper and appropriate for it as a part of the through line.

The receipts from gross earnings, according to the contract, are to be divided *pro rata*, in proportion to the miles which freight or passengers are carried on each road. Thus, if a passenger is transported the whole way from North Adams to Boston  $\frac{87}{148}$  is to be received by the Troy and Greenfield Railroad and Hoosac Tunnel and  $\frac{108}{148}$  by the Fitchburg Railroad. It is the proportion that the number of miles which the freight or passenger is transported on the Troy and Greenfield Railroad east of North Adams bears to the whole number of miles travelled on the two roads, which governs this division of the gross earnings. The second clause of the contract which makes this provision also provides for certain deductions from gross earnings before any division. The third clause imposes upon the defendant the duty of furnishing all motive power and cars, all supplies incidental thereto, and all servants and employees. The fourth clause allows to the defendant as compensation all the actual expenses of operating the road owned by the State, including therein all the expenses properly chargeable to such operation; it enumerates a

large number of charges which are, in the first instance, to be borne by the defendant, but which are to be afterwards divided in different proportions, some of which are arbitrarily fixed, and others regulated by various circumstances. The most important of these expenditures are to be divided in proportion to the total miles run on each road. The number of miles, therefore, run upon the Troy and Greenfield Railroad, so far as these items are concerned, is very important, as it increases the amount which the defendant is entitled to charge against the Commonwealth by reason of this use of the Troy and Greenfield Railroad. The engine, in switching freight cars, arranges them in the trains at North Adams in what is called station order; that is, the cars to be left at each station are placed together in the train, and in the order in which the stations are to be reached upon the journey. Cars arrive at North Adams for the defendant by various roads, and, if properly sorted and arranged there, expense, danger, and delay of switching are avoided at the intermediate stations. The report finds that, "considering the road from North Adams to Boston as a single road, it is the most economical and advantageous way of running the same for the defendant to switch all cars coming east into station order at North Adams, and it is, and was when said contract was made, the usual, customary, and most economical method of railroads to switch all cars into station order at the place where such cars are received."

The defendant has heretofore contended that it should be allowed for the number of miles run by this switching engine as an expenditure by it upon the road owned by the State, and the claim was allowed by the railroad commissioners in the last settlement between the parties for the operation of the road.

On April 30, 1885, the manager of the road—in view of the fact that the commissioners had allowed the defendant for the number of miles run at North Adams for switching cars into order for stations east of Greenfield, which is the terminus of the Troy and Greenfield Railroad—inquired of the defendant whether it would consent to bear this expense; and again, on May 16, informed the defendant that he should be compelled to order the work of switching cars stopped at North Adams unless the State was relieved of the expense. On June 30, the

manager ordered, by a letter directed to the defendant, that thereafter "cars for stations east of East Deerfield are not to be switched into station order at North Adams." This order having been approved by the railroad commissioners, and the defendant neglecting to comply with it, the Attorney General, under the St. of 1881, c. 230, § 4, makes complaint to this court, in order that the defendant may be compelled to comply with and obey it.

It is urged, that, as the contract does not give the defendant the exclusive right to operate the Troy and Greenfield Railroad, but only a right in common with other companies, these two connecting lines cannot be treated as a through line or a single road; nor can it be said that the Troy and Greenfield Railroad is, in the ordinary sense, operated by the defendant. But while the use by the defendant of the Troy and Greenfield Railroad must be modified so far as the rights and privileges which other companies have therein are concerned, such modification does not make the connecting roads any the less a through line, or any the less one which should be dealt with, so far as the relations of the two roads are concerned, as if it were a single and united line. The switching which is done at the end of the Fitchburg line at the Boston station for the purpose of properly arranging the cars into station order adds similarly to the number of miles run, so far as the defendant is concerned, and it is obliged to bear this expense. If that which is done at North Adams so far as stations beyond East Deerfield are concerned is for the benefit of the Fitchburg road, similarly that which is done at Boston so far as stations beyond the same point are concerned is for the benefit of the Troy and Greenfield Railroad. The defendant has the right to do the switching at North Adams as a necessary implication from the contract made with the Commonwealth, it being found that it is the most economical way, considering it as a through line, whether the number of miles run by such switching can be reckoned under the contract in estimating the whole number of miles run as a basis of the charges to be paid by the Commonwealth, or not. It is no answer to the objection that the order alters the contract, to say that, even if the number of miles run will be diminished by compliance with it, the obligation will remain the same to pay for so many miles as actually are run. The

defendant has the right to run, for switching purposes, that number of miles consistent with proper and economical management, both on its own road and on the Troy and Greenfield road, and to diminish this right is to deprive it of the right for which it had contracted.

The contention of the manager is, that the authority given by the St. of 1881, c. 230, "is necessary, because, since other companies use said yard and operate said railroad under contracts similar to that with the defendant, the power to regulate the conflicting claims of these companies must be lodged somewhere, and the depositary is the manager, an officer of the Commonwealth, independent of and impartial to all of said companies."

If the statute be construed as intending to provide only for the safety and convenience of the various parties using this road and yard, and to govern its use with a view to those public considerations by which all must be controlled in their management of their own property, and if it can be seen that this regulation was passed with that object, even if incidentally it affords a pecuniary benefit to the Commonwealth, by diminishing the number of miles run on the Troy and Greenfield road, it might still be maintained as a proper exercise of the police power of the State. Every holder of property, however absolute and unqualified his title may be, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community; and it may be requisite to prescribe regulations having for their object good order and safety to persons and property in the management of the yard and road, as to which there are different contracts, and in which there are varied interests. *Commonwealth v. Alger*, 7 Cush. 53. One entitled to the benefit of a contract, which itself is property, would be no more entitled to complain that his rights under it were thus limited, than would the owner of an estate because he was forbidden to make such use of it as would, in the opinion of the Legislature, be dangerous to public health and safety.

If the object of the statute, therefore, was solely to authorize the making of proper regulations for the use and management of the road and yard, in view of the fact that various parties had different and perhaps conflicting interests and rights, for the

purpose of providing for the public safety, and if the regulation passed by the manager had this for its object, it might well be contended to be a proper exercise of the police power of the State, which the defendant must have contemplated might be exerted when it made its contract. If the statute authorized more than this, it could not be upheld. While the legislative power over matters affecting the public interests still continues, notwithstanding any contract that may lawfully have been made as to the property of the State, "by becoming a party to a contract with its citizens, the government divests itself of its sovereignty with respect to the terms and conditions of the compact, and its construction and interpretation, and stands in the same position as a private individual." *Commonwealth v. New Bedford Bridge*, 2 Gray, 339, 350. Whatever construction be given the statute, it is clear that the regulation was not passed because of any requirement, real or supposed, of public necessity or safety, and in order to control the careful administration of the road and yard in this respect. Its purpose was to compel the corporation to abandon to a certain extent the use of the yard, unless it would abandon the claim it made, that, by this use with its switching engine, it established a demand to be adjusted in its account with the Commonwealth. There is no evidence or suggestion that this use interfered with good order or safety, or the rightful use to which others were entitled. That such was the purpose of the order, and that it had no other, is established by the correspondence which preceded it, and by the finding of the report, "that the object of the manager, in giving said order, was to save expense to the Commonwealth, and to increase the revenue derived by the Commonwealth from said contract."

Upon the whole case, we are of opinion that the manager was not authorized, either by virtue of the statute in question or otherwise, to issue the order forbidding the switching in the yard at North Adams unless the defendant should comply with his demand that it should make no claim on account thereof. However creditable the desire is to save expense to the Commonwealth, this result cannot be reached by annulling, directly or indirectly, any provisions of a contract into which it has entered, nor can any authority be given to do this.

*Complaint dismissed.*

**RICHARD CUNNINGHAM & another vs. CHARLES S. BUTLER  
& others.**

Suffolk. March 24. — May 11, 1886. W. ALLEN & HOLMES, JJ., absent.

If A., a citizen of this Commonwealth, with knowledge that his debtor residing here has stopped payment, and anticipating that proceedings in insolvency will be begun against the debtor, makes an assignment of his claim to a citizen of another State, without consideration, and the latter, before proceedings in insolvency are begun against the debtor, brings an action upon the claim in said State, and attaches property of the debtor there, this court will, on a bill in equity, by the assignee in insolvency of the debtor, restrain A. from prosecuting the action to judgment, if A. has control of such action.

BILL IN EQUITY, filed June 19, 1885, by the assignees in insolvency of the estate of Daniel C. Bird, to restrain the prosecution of two actions at law against him. The case was heard by *Gardner, J.*, and reserved for the consideration of the full court; such decree to be entered as justice might require. The facts appear in the opinion.

*E. M. Johnson & M. R. Thomas*, for the plaintiffs.

*H. R. Bailey*, for the defendants.

DEVENS, J. The case, as disclosed by the facts agreed and by the additional evidence submitted, is in substance as follows. Daniel C. Bird, a citizen and resident of Massachusetts, was in embarrassed circumstances, and indebted to the defendants, also citizens and residents of Massachusetts. After the suspension of payment by Bird, the defendants were informed by him, on the night of March 4 and 5, 1885, that a balance was due him from Aaron Claffin and Company of New York. On March 6, the defendants executed an assignment to one Fayerweather, a resident of New York, of their claims against Bird, which assignment was made without consideration and without previous communication. On March 11 and 25, 1885, two actions were commenced in New York in the name of Fayerweather on these claims against Bird as defendant, Claffin and Company being summoned as garnishees. Between March 13 and May 20, there were various meetings of Bird's creditors; and a proposition on his part for a composition under the St. of 1884, c. 236, was filed by Bird, the notice upon which was returnable on May 4. On

May 20, 1885, this proposal was withdrawn, regular proceedings in insolvency were continued therein, and on June 1, 1885, the plaintiffs were duly appointed assignees of Bird in insolvency. No judgment has, so far as appears, been obtained in New York on the claims sued by Fayerweather.

Without stating in detail the evidence, it is fairly proved that the defendants, with full knowledge that Bird was insolvent, anticipating that there might be proceedings in insolvency in this State, and intending to secure to themselves, to the exclusion of other creditors, the avails of the debt owing to Bird by Clafin and Company, made the transfer of their claims to Fayerweather; and that the suits in New York now carried on in his name are subject to their control and conducted for their benefit. The attachments made in New York by process of garnishment are to be treated, so far as the defendants are concerned, as made by them.

In *Dehon v. Foster*, 4 Allen, 545, it was held that this court had jurisdiction in equity, upon a proper case made, to enjoin a citizen of this Commonwealth from availing himself of an attachment of personal property in another State, in an action against a debtor who was insolvent under the laws of this Commonwealth, and thus preventing the same from coming to the hands of the assignee; and that it was no objection that the action was commenced before the institution of proceedings in insolvency, if this was done with a knowledge that such proceedings were about to be instituted, and with a view to obtain a preference. In the same case, 7 Allen, 57, it was held that the equitable right of the assignees was paramount, unless some valid claim or lien existed on the funds, which, under the laws of the foreign State, would divert them from the assignees if the defendants were compelled to abandon the attachment of them in the courts of that State.

If it be held that the facts in the case at bar are as we find them to be, the argument of the defendants is principally directed to showing that the case of *Dehon v. Foster* was erroneously decided; and that it should now be reconsidered and overruled. They contend that the provision of the Constitution of the United States, Art. 4, § 1, which enacts that "full faith and credit shall be given in each State to the public acts,

records, and judicial proceedings of every other State," was not therein sufficiently considered; and that, as the attachment proceedings in New York in the case at bar are judicial proceedings by a court of competent jurisdiction, the plaintiffs are not entitled to relief, as the courts in that State are entitled to decide to whom the property found therein belongs. They especially rely upon the cases of *Green v. Van Buskirk*, 5 Wall. 307, and 7 Wall. 139, *Warner v. Jaffray*, 96 N. Y. 248, and *Lawrence v. Batcheller*, 131 Mass. 504, all of which have been decided since *Dehon v. Foster*.

The case of *Green v. Van Buskirk* may be briefly stated as follows. A., B., and C. were residents and citizens of New York. A., being indebted to both B. and C., mortgaged certain personal chattels then in Illinois to B. Before the mortgage could be recorded in Illinois, or the property delivered there, one of which acts is essential by the laws of Illinois to the validity of the mortgage, as against third parties, although not by the laws of New York, C. took an attachment out from one of the courts of Illinois, a proceeding *in rem*, and, under the laws of that State, in due form levied on and sold the property. B. did not make himself a party to this suit in attachment, although he had notice of it, and, by the law of Illinois, a right to make defence to it; but, after its termination, brought suit in New York against C. for taking and converting the chattels. C. pleaded in bar the proceedings in attachment and the judgment obtained in Illinois. It was held in the Supreme Court of the United States, reversing the decision of the Supreme Court of New York, that, in order that the "full faith and credit" required by the Constitution should be given to the judicial proceedings in the State of Illinois, the judgment of the court there, that the personal property there situate was subject to this process of attachment, and that the proceeding in attachment took precedence of the prior unrecorded mortgage from A., was binding elsewhere; that, as the effect of the attachment, judgment, levy, and sale was to protect C., if sued in Illinois for the property thus acquired, it would protect him when sued in the court of another State for the same transaction, if he justified in the same manner; that the fiction of law, that the domicil of the owner draws to it his personal estate, yields whenever, for the purposes of justice, the



actual situs of property should be examined into; that a title acquired under the attachment laws of a State, and held valid there, would be held valid in another State, even if all parties interested in the controversy were citizens of such other State; and that thus, as an attachment of personal property in Illinois would take precedence of an unrecorded mortgage executed in another State where record was not necessary, it would do so though the owner of the chattels, the attaching creditor, and the mortgage creditor were all residents of such other State.

But the case of *Dehon v. Foster* recognizes the law to be as held by the Supreme Court of the United States in *Green v. Van Buskirk*. "The case," says Chief Justice Bigelow, "proceeds on the ground that the defendants, if allowed to proceed with their action, will perfect the lien which is now inchoate under their attachment, and will thereby establish a valid title to the property of the insolvent debtors under the laws of Pennsylvania." Holding this to be the law, it was decided that the act of the defendants, in causing the property of the insolvent debtors to be attached in a foreign jurisdiction, tends directly to defeat the operation of the insolvent law in its most essential features, to prevent a portion of the property of the debtors from coming to the assignees to be equally distributed among their creditors, and to obtain a preference for themselves; that the defendants, being citizens of this State, were bound by its laws, and could not be permitted to do any acts to evade or counteract their operation, the effect of which would be to deprive other citizens of rights which those laws were intended to secure.

The case of *Lawrence v. Batcheller, ubi supra*, clearly recognizes the ground above stated as that upon which *Dehon v. Foster* proceeds, and in no way controverts it. That was a case in which the attaching creditor, who was a resident in this State, had proceeded to judgment in a foreign State after proceedings in insolvency here, and had actually collected the amount, by virtue of his attachment, from funds in the hands of a trustee of the debtor. He was sued in this State for the amount he had thus collected by the assignee in insolvency. It was said, referring to the case of *Dehon v. Foster*: "Because it was beyond the power of the court to call in question the validity of this lien acquired under the laws of another State, it proceeded to enjoin

the defendants over whom the court had jurisdiction from enforcing in another State their legal rights." It was further held, that, the defendant having been permitted without interference to proceed to judgment, an action at law for the value of the property obtained would not lie against him by the assignee, as there were many rights in equity which courts of law did not recognize at all, for which reason defendants in equity were often enjoined from prosecuting actions at law.

The case of *Warner v. Jaffray*, *ubi supra*, was as follows. A general assignment for the benefit of creditors had been made under the general assignment act of New York (Laws of 1877) on March 1, 1881. It was not recorded in Pennsylvania until March 18, where it could only become operative by record so as to affect any *bona fide* purchaser, creditor, &c. Previously to the 18th, the defendant had brought suit in Pennsylvania, and attached property there. He was himself a citizen of New York, as were the debtor and his assignee. It was held, in a proceeding brought against the creditor in New York, that the lien he had acquired in Pennsylvania was saved from the operation of the assignment; that he had the same right to enforce payment of his claim out of the debtor's property that a resident creditor in Pennsylvania had; and that he would not, by any order, be restrained from pursuing it. But in *Warner v. Jaffray* the assignment was of an entirely different nature from that made in proceedings in insolvency, such as is found in the case at bar. The property of the debtor was not taken for distribution by the law, but by his own voluntary act. The assignment did not operate on the claims of the creditors, or place them under any obligations to join in it. They were entirely free to act, could refuse to have anything to do with it, could retain their claims, and enforce them afterwards against the debtor, or immediately against any property not covered by the assignment. The assignee was a trustee only to the extent that the creditors chose to accept him as such. As he violated no rights of other creditors in pursuing any property not covered by the assignment, and was bound in no way thereby, he could not properly have been restrained from seeking his remedy wherever there was attachable property which the assignment did not reach.

The cases relied on by the defendants cannot therefore be deemed to diminish the authority of *Dehon v. Foster*. Nor can we see that there is injustice in holding that, in a State which has enacted a system for an equal distribution of the assets of an insolvent among his creditors, residents of that State, who are bound by the decree establishing the insolvency, should be restrained from seeking in other States assets which otherwise might reasonably be expected to come to his assignee.

While the claims of the residents of another State to property there situate might not be set aside or compelled to yield in such State to those of such assignee, yet it could properly be held that, where the pursuing creditors were not citizens of the State whose process was invoked, the courts thereof would not sustain their claim in preference to that of an assignee obtaining title under the laws of another State, certainly not if such title was previously acquired. *Burlock v. Taylor*, 16 Pick. 335. *Bentley v. Whittemore*, 4 C. E. Green, 462. *Sanderson v. Bradford*, 10 N. H. 260.

It has been decided in Pennsylvania, that, while the claims of a receiver of a corporation, appointed by the courts of another State, to property there situate, could not be recognized when they came in conflict with those of residents of Pennsylvania, yet that, where a receiver of a corporation had been appointed by a court of competent jurisdiction in another State, a creditor who resides in that State, and is bound by the decree of the court appointing this receiver, cannot, in an attachment execution, recover assets of the corporation which the receiver claims. *Bagby v. Atlantic, Mississippi, & Ohio Railroad*, 86 Penn. St. 291.

In the case at bar, it is true that the defendants had made their attachment through Fayerweather in New York before there had been an assignment in insolvency in this State actually executed, but this was done with full knowledge on their part that the debtor Bird was embarrassed and had suspended payment, and necessarily with intent to avoid the effect of the assignment so far as the property attached was concerned. As residents of this State, they cannot be allowed to this extent to defeat the operation of the assignment, and thus to obtain a preference over other creditors resident here. They are within the limits of the

jurisdiction of this court, and amenable to its process, and should be enjoined from prosecuting a suit, the effect of which, if successful, will be to work a wrong and injury to other residents of the State.

*Injunction accordingly.*



CHARLES FAULKNER & others vs. MICHAEL HYMAN & others,  
& trustees.

Suffolk. March 15. — May 11, 1886. W. ALLEN & HOLMES, JJ., absent.

An assignment of property, executed in another State, by a debtor domiciled there, for the benefit of his creditors, which is valid by the law of that State, but is invalid by the law of this Commonwealth, because not executed or assented to by the creditors, will not be upheld in this Commonwealth, as against attaching creditors of the assignor constituting a partnership, although some of such creditors are domiciled in the State where the assignment was executed, and where the firm has a place of business, and some in another State, the others being domiciled and the firm having its usual place of business here.

**TRUSTEE PROCESS.** The Superior Court ordered judgment for the plaintiffs, as against the claimant of the funds in the hands of the trustees, and that the trustees be charged; and the claimant appealed to this court. The facts appear in the opinion.

*J. D. Ball*, for the claimant.

*A. E. Pillsbury*, for the plaintiffs.

**DEVENS, J.** The plaintiffs, on December 24, 1884, attached, as property of the principal defendants, certain debts due to them from persons in this Commonwealth named in the writ as trustees. Prior to this attachment, the defendants had, on December 20, 1884, assigned to the claimant all the property of their copartnership by a description sufficiently general to include these claims, in trust to pay certain preferred debts in full, and afterwards to pay their remaining debts proportionally to their respective amounts, so far as the residue should suffice for that purpose. The assignment was made in the city of New York by the defendants, who were residents and carried on business there, to the claimant, also a resident there. It is conceded that it was recorded there on December 22, 1884, and that it is in all respects valid by the laws of the State of New York.

This assignment was not executed or assented to by any of the creditors named therein, or any other creditors of the principal defendants for whose benefit it purports to have been executed. The claimant contends that, even if the plaintiffs could be deemed a Massachusetts partnership doing business solely in this Commonwealth, the assignment would be valid against them. The law of any State has no force or effect *proprio vigore* beyond its territorial limits. Whatever extra-territorial vitality it may have is owing to the comity which should prevail between different states or nations. That comity does not require that it should be executed when it would be against the public policy of the State where the remedy is sought, or would be injurious to the just interests of its citizens. It certainly would be unjust to creditors residents of this State, if they were to be deprived of the benefit of an attachment they had lawfully made, or other lien they had lawfully acquired, on the property of their debtors here situate, by an assignment which, if made here between citizens, would be inoperative for want of compliance with legal requisitions, even if such assignment was valid in the State where it was made, and sufficient to transfer property under its control. *Green v. Van Buskirk*, 5 Wall. 307; 7 Wall. 139. *Dehon v. Foster*, 4 Allen, 545. *Cunningham v. Butler*, ante, 47.

• It has repeatedly been held in this Commonwealth, and by a long series of decisions, that a voluntary assignment in trust for the benefit of creditors, the only consideration of which is the acceptance of the trust by the assignee, is invalid against an attachment, except so far as assented to by creditors, in which case, being good at common law, it will protect the property from attachment to the extent of the amount due the creditors thus assenting. This, for the reason that there is no adequate consideration unless with the assent of creditors, without which no insolvent debtor should be allowed so to dispose of his property as to place it beyond their reach. It has further been held, that such assent is not to be presumed, but must be shown by some affirmative act, such as presenting claims, accepting a dividend, or distinctly becoming a party to the written assignment. *May v. Wannemacher*, 111 Mass. 202, 209. *Swan v. Crafts*, 124 Mass. 453. *Pierce v. O'Brien*, 129 Mass. 314. The rule in

Massachusetts on this subject appears to us to rest upon a sound reason. The earliest case on the matter is that of *Widgery v. Haskell*, 5 Mass. 144. This has been repeatedly affirmed, and we see no reason for changing it in view of decisions made elsewhere, as we are urged to do by the claimant.

But if the assignment made in New York would be inoperative against the plaintiffs if they were residents of Massachusetts, it is urged that they must be dealt with as if they were all residents of New York. By the writ, it appears that four of the plaintiffs are citizens of Massachusetts, two of New Jersey, and one of New York, having their usual place of business in Boston. The claimant alleges that "several" of the partners are residents of New York, but does not deny that several are citizens and residents of Massachusetts. Nor do his allegations deny that the usual place of business of the plaintiffs is in Boston, although it is asserted that they have a place of business in New York, where the indebtedness was contracted.

A partnership is not a legal entity, having, as such, a domicile, although for purposes of taxation and for similar purposes it may be treated by statute as having a locality. *Ricker v. American Loan & Trust Co.* 140 Mass. 346. Nor does the allegation of the claimant undertake to establish its situs in New York. The allegation that the firm has a place of business in New York is entirely consistent with its having its principal place of business in Boston. The right of the plaintiffs to recover cannot be defeated upon the ground that their firm, as such, is to be treated as if it had solely a residence in New York. It must be determined what the rights of the plaintiffs are, in view of the fact that some of them are citizens of New York, and others of Massachusetts and New Jersey. If some of the plaintiffs would be precluded from holding the assigned property by attachment, as against the assignment, it is urged that all are necessarily so. If a suit were brought by New York creditors alone, it may be that they could not be heard to deny the validity of the assignment, because, as citizens of that State, they would be bound by its laws, even here. *May v. Wannemacher*, *ubi supra*. If brought by Massachusetts creditors alone, it is equally true, as the assignment is not valid by the law of this Commonwealth, that the attachment would prevail. All the partners are necessarily

compelled to join in the action, and the New York plaintiffs are under no disability to sue here. The principle of comity cannot require us to enforce a foreign law, differing from our own, against the just rights of our own citizens, and to their prejudice, because, if we fail so to do, the residents of another State would incidentally obtain a benefit which they could not otherwise obtain. It cannot be required of us to deny our own citizens their lawful rights, for the sake of denying to residents of New York that which we could not accord them except by reason of our respect to the legislation of another State of which they are residents, if they had brought suit alone. Considering the fact that the other plaintiffs are residents of Massachusetts, the fact that some are residents of New York places us under no duty to enforce the New York law on the subject of assignments.

*Judgment for the plaintiffs affirmed.*

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### JOHN N. SHATTUCK vs. FRANK C. BILL.

Middlesex. March 29. — May 11, 1886. W. ALLEN & HOLMES, JJ., absent.

In an action for an illegal arrest, made by authority of a certificate issued by a magistrate upon the affidavit of the clerk of the defendant's attorney, evidence is admissible, on the issue of the authority of the clerk to act in the matter, of the presence and conduct of the defendant at the hearing, after the arrest, upon the application of the plaintiff to take the oath for the relief of poor debtors, although such hearing was subsequent to the date of the writ in the action for the illegal arrest.

The authority of an attorney at law to collect a debt does not cease on his obtaining a judgment and execution, and if, by his procurement, or that of his clerk acting within the general scope of his employment, the judgment debtor is illegally arrested, the principal of the attorney is liable therefor.

TORT for an illegal arrest. Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions, in substance as follows:

It appeared that Bill brought an action against Shattuck in the Superior Court in Suffolk County, and, after trial before a jury, recovered judgment. The action was brought by one Way, an attorney at law, and he conducted the case at the trial for

Bill. Execution was issued to said attorney and was in his office. One Clarence F. Eldridge, who was and had been for about three years a clerk in general employ in the attorney's office for him, and who assisted the attorney at the trial, seeing the execution in the office and deeming it needed attention, went before a master in chancery for Suffolk County and applied for a certificate, and made affidavit, in the form provided by statute, under the Pub. Sts. c. 162, § 17, *cl.* 5, and the master annexed to the execution his certificate authorizing the arrest of Shattuck, as well as the said affidavit of Eldridge. Shattuck was described in the execution as of Natick, in the county of Middlesex, and it appeared that his residence was there and that he had no usual place of business in the county of Suffolk. Eldridge placed the execution in the hands of a deputy sheriff, and caused the arrest of Shattuck thereon, and he was taken by the deputy sheriff before the same master in chancery for Suffolk County, when he recognized in the usual form prescribed by the provisions of said chapter 162.

Eldridge, who was called by Shattuck, testified that he made said affidavit, procured said certificate, and caused the arrest, without the knowledge of, or any instruction from, said attorney, or from Bill.

Bill testified that he did not specially authorize his attorney to make said affidavit or cause said arrest, and that he did not give any instruction to any one about making said affidavit or procuring such certificate or arrest, and that he had no knowledge of either of them until after this action was commenced.

Shattuck gave notice of his application to take the oath for the relief of poor debtors, and hearings were had; and he offered evidence tending to show the presence and acts of the defendant at said hearings, which were had after the date of the writ in this action, as competent to prove authority on the part of Eldridge from the defendant to make said affidavit and cause said arrest in his behalf. To the admission of this evidence the defendant objected, but the judge admitted it.

At the close of the evidence the defendant requested the judge to instruct the jury as follows: "1. If a clerk in the office and employ of the attorney of record in the original suit, in which judgment was obtained and the execution was issued thereon,



without the knowledge and without any instructions from said attorney or from the defendant in this action, the plaintiff in the original action, so to do, applied to a master in chancery, and said master thereupon received such application and annexed the affidavit and his certificate to the execution, and on account thereof, and, without any knowledge on the part of the defendant that the arrest was to be made, this plaintiff was arrested, the plaintiff cannot recover.

"2. If the attorney of record in the original action, in which judgment was obtained and the execution was issued thereon, without any instructions from or knowledge on the part of the defendant in this action, the plaintiff in the original action, so to do, applied to a master in chancery, and said master thereupon received such application and annexed the affidavit and his certificate to the execution, and, on account thereof and without any knowledge on the part of this defendant that the arrest was to be made, this plaintiff was arrested, the plaintiff cannot recover."

The court refused so to rule, and instructed the jury as follows: "The arrest was illegal. The plaintiff for this illegal arrest may have an action against the person who made the affidavit and applied for and obtained the certificate, to recover at least nominal damages, and actual damages if any are proved, or against the principal, if any, for whom said person was the agent in the transaction, acting under the direction of his principal. The plaintiff contends that this affidavit was made by Eldridge, a clerk in the office of Mr. Way, the attorney of record having the execution for his client, and that Bill is liable in this action for damages occasioned by the action of his attorney through the act of his clerk in his office. Some time has been spent in this case by evidence tending to show that Bill, who was the plaintiff in the original action against the present plaintiff, knew of and authorized the application for the certificate and the arrest of the plaintiff in this action. If it is proved that Bill directed or had knowledge of the certificate and arrest, he is liable in this action; and if the jury are satisfied that the certificate was made and the arrest procured by Mr. Way, the attorney of the plaintiff in the original action, then the defendant is liable for nominal damages, and for actual damage too, if proved."

The jury found for the plaintiff in the sum of \$387.50; and the defendant alleged exceptions.

*E. M. Bigelow*, for the defendant. 1. The trespass was a transitory, almost a momentary one. It began with the arrest, and ended with the recognizance. The recognizance was void. *New-market National Bank v. Cram*, 131 Mass. 204. *Smith v. Bean*, 130 Mass. 298. *Learnard v. Bailey*, 111 Mass. 160. *McGregor v. Crane*, 98 Mass. 530.

2. The only persons concerned in this trespass were Eldridge, the unauthorized clerk, the officer, and the master. Such a trespass cannot be ratified by anybody, so as to make the ratifier a trespasser. 2 Greenl. Ev. § 68. *Wilson v. Tumman*, 6 M. & G. 236. *Woollen v. Wright*, 1 H. & C. 554. *Slackford v. Austen*, 14 East, 468, 472. *Campbell v. Phelps*, 17 Mass. 244, 246. *Turner v. Sisson*, 137 Mass. 191.

It is only continuing trespasses, as where property has been obtained by trespass and retained, that can be ratified at all, and even in these cases it is extremely doubtful whether the ratifier becomes a trespasser *ab initio*, or only for subsequent acts. *Miller, J., in Lovejoy v. Murray*, 3 Wall. 1, 9.

3. When the notice to take the poor debtor's oath was served upon Bill, it was competent for him to appear before the master at the time and place appointed, to see what it meant, and even to examine the debtor, without being a trespasser. If the affidavit and certificate had been before a proper officer, he could (the action perhaps would) have ratified the proceeding so as to protect Eldridge from being a trespasser in causing an unauthorized arrest, but not to make himself a trespasser. But the whole force of this action, on the part of Bill, is exhausted and spent when we have extracted this meaning out of it. The evidence objected to, therefore, should have been excluded. *Woollen v. Wright, ubi supra*. Besides, there is no evidence that Bill knew what master took the affidavit and annexed the certificate; therefore there could be no ratification. 2 Greenl. Ev. § 66, and cases cited. Furthermore, the application to take the oath, the notice thereon, and any proceedings thereon, were clearly *coram non judice* and void, like the recognizance.

4. Eldridge, as a clerk in Way's office, had no authority to make the affidavit and cause the arrest. *Knight v. Sampson*, 99

Mass. 36, 38, per Gray, J., and cases cited. The instruction first requested should, therefore, have been given.

5. Even Way himself had no authority to do anything further for his client without further instructions. He had conducted the original suit to its termination, and had obtained judgment and execution. There was no attachment in the original action, no bail to pursue, no appeal to be taken, no writ of error or review to be brought. He had done his work and was entitled to his fees. *Tipping v. Johnson*, 2 B. & P. 357. *Savory v. Chapman*, 11 A. & E. 829. *Smith v. Keal*, 9 Q. B. D. 340, 354. *Kellogg v. Gilbert*, 10 Johns. 220. *Lewis v. Gamage*, 1 Pick. 347. *Eliot v. Lawton*, 7 Allen, 274. *Brown v. Kendall*, 8 Allen, 209. Pub. Sts. c. 159, § 42.

6. If he had a lien upon the judgment and execution for his fees, and had undertaken to collect them by arresting the debtor, and had committed the same blunder Eldridge committed, he and not his client ought to suffer. *Smith v. Keal*, *ubi supra*.

The second instruction prayed for ought, therefore, to have been given.

The plaintiff's own evidence proved the facts upon which the first prayer for instruction was predicated, and had no tendency to prove anything else. And even if there was any evidence tending to prove anything else, a party has a right, upon proper requests, to have the law applicable to his view of the facts clearly stated to the jury.

7. The instruction given was erroneous for want of evidence, as well as of law. *Smith v. Keal*, *ubi supra*. *Wilson v. Tushman*, *ubi supra*. *Woollen v. Wright*, *ubi supra*.

*P. H. Cooney*, (*H. G. Sleeper* with him,) for the plaintiff.

DEVENS, J. The plaintiff resided in Middlesex County, and had no usual place of business in Suffolk County. The application for a certificate authorizing the arrest was made before a magistrate in Suffolk, and it is conceded that the arrest made by authority of this certificate was illegal. Pub. Sts. c. 162, § 17. As the defendant employed the attorney in whose custody the execution was, if he authorized the arrest, either in terms or by the directions which are properly to be implied from the employment of the attorney and the authority conferred, he would

be responsible for the wrong done in the performance of the duty entrusted to his agent. Story on Agency, § 452. *Moore v. Fitchburg Railroad*, 4 Gray, 465.

The plaintiff, after his arrest, gave notice of his intention to take the oath for the relief of poor debtors; and evidence was offered of the presence and conduct of the defendant at these hearings, as tending to prove authority from him to make the affidavit and cause the arrest on his behalf. To the admission of this evidence the defendant has no just ground of exception. If the whole proceeding in relation to the arrest was without authority from the defendant, it is not reasonable to suppose that he would take part in opposition to the application by the plaintiff to relieve himself therefrom; and his acts in relation thereto, although occurring after the arrest, had a tendency to show that it was initiated by his authority almost as directly as if he had thus expressly asserted it. *Collett v. Foster*, 2 H. & N. 356.

The affidavit upon which the certificate was founded was, in fact, made by a clerk in the attorney's office; and the defendant requested an instruction that, "if a clerk in the office and employ of the attorney of record in the original suit, in which judgment was obtained and execution issued thereon, without the knowledge and without any instructions from said attorney, or from the defendant in this action, the plaintiff in the original action, so to do, applied to a master in chancery, and said master thereupon received such application and annexed the affidavit and his certificate to the execution, and on account thereof, and, without any knowledge on the part of the defendant that the arrest was to be made, this plaintiff was arrested, the plaintiff cannot recover." Unless it is true that the attorney himself, who has in his hands an execution to collect, cannot proceed to levy it by arrest of the person of the defendant without some special authority or direction of his client, to have given this instruction would have been erroneous, and have led to grave misunderstanding. There was evidence that the clerk, Eldridge, who made the affidavit, was in the general employ of the attorney, and had assisted him in the trial of the case which had resulted in the judgment on which execution had issued; and that he, deeming that the execution needed attention, had

therefore made the necessary affidavit, and placed the execution in the hands of a deputy sheriff. Even if the clerk had received no special instructions from the defendant or his attorney, it might well have been proved to the satisfaction of the jury, that, in taking the steps he did, he had acted by virtue of a general authority from the attorney, and as managing clerk entrusted with the collection of claims which were deposited in the office for that purpose, and that his acts in this matter are to be treated as those of the attorney himself.

That this was the view of the presiding judge is quite clear. His instruction permitted the plaintiff to recover only upon one or the other of two grounds: first, upon the ground that the defendant himself had actually directed the arrest, or had had antecedent knowledge of the certificate and the arrest; or secondly, upon the ground that "the arrest had been procured by Way, the attorney of the plaintiff in the original action, holding the execution for collection." Upon the first of these grounds, had the fact been proved, we do not understand the defendant to contend that he would not be liable; but he does contend, and such was in substance the second request for an instruction made by him, that he was not responsible for the act of the attorney in the original action, in applying to the master for a certificate which would authorize the arrest, and in proceeding to make it, if these acts were done without the knowledge of or directions from the defendant himself.

While it does not clearly appear from the bill of exceptions what were the instructions as to the liability of the defendant for the acts of the clerk of the attorney, as the only ground, except that of express authority, upon which the plaintiff was allowed to recover was by reason of the act of the attorney, we must assume, in favor of the defendant, that the acts of the clerk were treated as his acts only if done within the general scope of his employment, and that knowledge of, or instruction to do, the particular act by the attorney was not necessary. This was correct. Details of a law business, especially such as that of the collection of claims, are often not attended to by the attorney, but entrusted to subordinates, whose acts in the conduct of a business are his, so far as civil responsibility therefor, either on his own part or that of his clients, is concerned.

But, if this be conceded, the defendant still contends that the attorney had no authority himself, without express direction, to take the necessary steps, and to proceed to arrest the plaintiff.

Certain English cases have been cited by the defendant to the effect that the authority of an attorney terminates with obtaining judgment and execution. They do not require comment, except to say that they proceed upon the ground that all the attorney is required to do by his warrant is then terminated. But the warrant of attorney is not used in this Commonwealth, and in this respect there is a difference between the English practice and our own. Nor does it appear that obtaining the execution is now recognized in England as the termination of the duty of the attorney, if it was so formerly. In *Collett v. Foster, ubi supra*, the principal was held liable for the act of his attorney in causing a plaintiff improperly to be arrested on *ca. sa.*, no order to this effect having been given by him. In *Smith v. Keal*, 9 Q. B. D. 340, 353, it is said by Lindley, J.: "It is the duty of a solicitor to conduct the action in the ordinary way, and, if his client obtains judgment, it is his duty to do such acts as may be necessary to obtain the fruits of the judgment. If a *fi. fa.* is necessary he must issue it, and make the proper indorsement on the writ; and if he makes a mistake in so doing his client is responsible." In *Butler v. Knight*, L. R. 2 Ex. 109, 113, it is said, in substance, that the distinction between powers of attorney before and after judgment is less marked than formerly. The attorney has a reasonable discretion, in the attainment of the object in view, in the selection of remedies. It would be mischievous to hold, where there is any evidence that the authority of the attorney was continued after judgment, that the attorney had not authority to act according to the exigency of the case.

It has always been held in this country that an attorney is invested with a large discretionary power in everything pertaining to the collection of a demand entrusted to him for that purpose; and that his client must answer in damages, if injury is occasioned by his conduct in the general scope of this employment. While he cannot discharge a debt or an execution without receiving satisfaction, he has control of the selection of the legal remedies and processes which he may deem most effectual in

accomplishing his object. The confidence reposed in him by his client, and the supposed ignorance by the latter of the most appropriate remedies, requires this. *Willard v. Goodrich*, 31 Vt. 597, 600. *Jenney v. Delesdernier*, 20 Maine, 183. *Fairbanks v. Stanley*, 18 Maine, 296. *Turner v. Austin*, 16 Mass. 181. *Gordon v. Jenney*, 16 Mass. 465. *Caswell v. Cross*, 120 Mass. 545. *Carleton v. Akron Sewer Pipe Co.* 129 Mass. 40. *Moulton v. Bowker*, 115 Mass. 36. *Schoregge v. Gordon*, 29 Minn. 367. *Clark v. Randall*, 9 Wis. 135.

Proceedings on the execution are proceedings in the suit which the attorney is authorized to bring. *Union Bank v. Geary*, 5 Pet. 98, 112. *Erwin v. Blake*, 8 Pet. 18, 25. *Flanders v. Sherman*, 18 Wis. 575. *Planters' Bank v. Massey*, 2 Heisk. 360. *Mayer v. Hermann*, 10 Blatchf. 256. It has been held that he may receive seisin on levy of execution, may discharge execution, may direct it to be issued in a particular manner, and may in his discretion take out *fi. fa.* or *ca. sa.*, and cause the defendant to be arrested thereon. *Pratt v. Putnam*, 13 Mass. 361. *Langdon v. Potter*, 11 Mass. 313. *Corning v. Southland*, 3 Hill (N. Y.) 552. *Hyams v. Michel*, 3 Rich. (S. Car.) 303.

In *Gray v. Wass*, 1 Greenl. 257, it is said by Chief Justice Mellen: "It is admitted that the power of an attorney continues until he has collected the debt which was committed to him for collection." In *Heard v. Lodge*, 20 Pick. 53, 59, it is said by Mr. Justice Dewey: "It is within the scope of the powers of the attorney to institute all such further proceedings as are necessary to render the judgment effectual to the creditor in the recovery of his debt. It has been held to be the imperative duty of an attorney in the original action, where the body of the debtor was arrested, to institute a *scire facias* against the bail; and, if he neglect so to do, he is held responsible." *Dearborn v. Dearborn*, 15 Mass. 316.

In the case at bar, the principal was therefore properly held liable for the act of his attorney. *Exceptions overruled.*

NOAH CHESMAN & another, executors, vs. JOHN CUMMINGS  
& another.

Suffolk. March 19. — May 12, 1886. MORTON, C. J., did not sit.  
W. ALLEN & HOLMES, JJ., absent.

The doctrine that a court of equity will not, by a decree for specific performance, compel a party to accept a title to land which is so doubtful that it may be exposed to litigation, does not apply when no question of fact is involved, and all parties in interest are before the court.

A., by his will, provided that the executors thereof were to have full charge of his real estate, to lease the same and collect the rents, and, as soon as convenient and profitable, to sell and convey the same to any purchaser or purchasers, at public or private sale, without any order of court or license; with the power to "turn over and convey any part or parts of the same in discharge of any devises or bequests herein, . . . all as in their judgment may appear best." Afterwards A. executed a deed, by which he conveyed his real estate to three trustees, to have and to hold to them, "and their heirs and assigns forever, in trust nevertheless for the said A., with full power and authority to said trustees to manage said real estate as they may deem best, to lease, let, to sell and convey the same, or any part thereof, at public or private sale, and to execute and deliver a deed or deeds of the same." Subsequently, the testator made a codicil to his will, bestowing an additional legacy, and in all other respects confirming his will. After A.'s death, the trustees named in the deed conveyed the real estate to the executors of his will, "executors as aforesaid, their heirs, successors, and assigns, for their use and behoof forever." The executors made a contract with a person for the sale of a parcel of the real estate, and executed to him a quitclaim deed of the same, "by virtue of the power conferred upon us by said will, and of every other power us thereto enabling," which he refused to accept. *Held*, that the executors had power to convey a good title to the land, and could maintain a bill in equity for specific performance of the contract.

BILL IN EQUITY, filed November 11, 1885, by the executors of the will of William Perry, against John Cummings, to enforce specific performance by the defendant of an agreement in writing for the purchase of a parcel of land in Brockton. By an amendment to the bill, William Perry, the sole heir at law and next of kin of the testator, was made a party defendant. Hearing before *Devens, J.*, who reserved for the consideration of the full court the following case:

The testator died on May 29, 1884, leaving a will, dated January 18, 1883, which was duly proved and allowed, of which the plaintiffs were appointed executors, and which, after giving certain legacies, provided as follows: "I direct and authorize the executors of my will to have full charge of all my real estate, to



lease the same and collect the rents, and, as soon as convenient and profitable, to sell and convey the same to any purchaser or purchasers, at public or private sale, without any order of any court or license therefrom; or they may turn over or convey any part or parts of the same in discharge of any devises or bequests herein, on consent of such devisee or devisees, all as in their judgment may appear best."

On May 13, 1884, the testator conveyed several parcels of real estate, of which that which is the subject of this suit was one, to three persons, to have and to hold to them, "and their heirs and assigns forever, in trust nevertheless for the said Perry, with full power and authority to said trustees to manage said real estate as they may deem best, to lease, let, to sell and convey the same, or any part thereof, at public or private sale, and to execute and deliver a deed or deeds of the same."

On May 14, 1884, the testator executed the following codicil:

"I William Perry of Brockton in the county of Plymouth and Commonwealth of Massachusetts do make this my codicil to my last will dated the eighteenth of January, A. D. 1883.

"I do hereby give and bequeath to Mrs. Ann Elizabeth Barrell of West Bridgewater in said county the sum of one thousand dollars. In all other respects I hereby confirm said will."

On November 18, 1884, the persons named as trustees in the testator's conveyance to them of May 13, 1884, by a quitclaim deed, which recited that "whereas the said William Perry has died, and the said trust created by said deed has terminated," conveyed said real estate to the plaintiffs, "executors as aforesaid, their heirs, successors, and assigns, for their use and behoof forever."

On October 21, 1885, the plaintiffs, as executors of Perry's will, and the defendant Cummings entered into an agreement in writing, by which the plaintiffs agreed to sell and convey to him, upon the payment by him of \$500, a certain parcel of land in Brockton, "such conveyance to be made by deed without any covenants by" the plaintiffs "except for their own acts;" and he agreed to accept the deed, within ten days from the date of the agreement, "provided a good title to the land be thereby conveyed free from all incumbrances," and to pay the executors therefor the sum above named.

On October 27, 1885, the plaintiffs, as executors of the will of Perry, "by virtue of the power conferred upon us by said will, and of every other power us thereto enabling," executed a quit-claim deed of the land named in said agreement, covenanting "that the premises are free from all incumbrances made or suffered by us," and tendered the same to Cummings and demanded payment of said \$500 of him. Cummings refused to accept the deed or pay the price therefor.

*J. H. Young, (A. S. Wheeler with him,)* for the plaintiffs.

*W. H. Wade,* for the defendant Cummings.

DEVENS, J. It has been heretofore held, in proceedings to enforce specific performance of a contract for the purchase of real estate, that a purchaser will not be required to accept any title which is doubtful, or which, even if apparently good, may possibly be defeated by facts and circumstances the existence of which cannot be accurately determined. *Jeffries v. Jeffries*, 117 Mass. 184. It was therefore decided in *Noyes v. Johnson*, 139 Mass. 436, that a person was not bound to accept a title by adverse possession, depending upon a long and difficult investigation of facts.

A title however, cannot be considered doubtful when there can be no question of fact involved in a decision as to its validity, but one of law only, upon which the court where the controversy is litigated is competent finally to pass.

It is unnecessary to consider the question whether, when only the vendor and vendee are before the court, and there are other persons interested in the title, or who may be thus interested, who will not be bound by the decree, it is the duty of the court to determine, as between the parties before the court, whether or not the title is good, and to enforce or refuse to enforce specific performance accordingly. The later cases in England have indicated a disposition to change what has heretofore been recognized as the rule, whether wisely or not may be doubted, and to hold that, even as between vendor and purchaser in such case, as a general and almost universal rule, the court is bound "to ascertain and determine, as it best may, what the law is, and to take that to be the law which it has so ascertained and determined." *Alexander v. Mills*, L. R. 6 Ch. 124. *Osborne v. Rowlett*, 13 Ch. D. 774. *Forster v. Abraham*, L. R. 17 Eq. 351.

It has always been held that, where all parties are before the court, so that a decision will have the force and effect of an adjudication in a direct proceeding for the purpose, and thus be an end of controversy on the subject, the validity of a title which depends upon a principle of law is to be finally decided. It is then to be determined to be either good or bad, and thus that the purchaser is either bound to take it, or may refuse it. As by that decision all parties will be concluded, such a title cannot be doubtful. *Fry on Spec. Perf.* (3d Am. ed.) § 862. *Sohier v. Williams*, 1 Curtis C. C. 479. *Butts v. Andrews*, 136 Mass. 221. *Cornell v. Andrews*, 8 Stew. (N. J.) 7; 9 Stew. 321. *Gill v. Wells*, 59 Md. 492. *People v. Stock Brokers Building Co.* 92 N. Y. 98.

In the case at bar, the heir at law having been brought into court by the amendment of the bill, all parties in interest are before us, and we therefore proceed to pass upon the question of title.

The difficulty in regard to it arises from the execution and delivery of the deed of trust by the testator after the making of his will. This deed conveyed his real estate, including the lot of land here in question, to three trustees, to have and to hold to them "and their heirs and assigns forever, in trust nevertheless for the said Perry, with full power and authority to said trustees to manage said real estate as they may deem best, to lease, let, to sell and convey the same, or any part thereof, at public or private sale, and to execute and deliver a deed or deeds of the same."

After the execution of this deed, the testator made a codicil bestowing an additional legacy, and in all other respects confirming his will, so that he cannot have intended that the deed should operate as a revocation thereof. The trustees under this deed, upon the decease of Perry, deeming that the trust created thereby was terminated by the death of the testator, conveyed the real estate to the executors of his will, "their heirs, successors, and assigns, for their use and behoof forever." The plaintiffs, as executors, having made a contract with Cummings for the sale of the parcel of land named in the bill of complaint, have tendered to him a deed in the ordinary form, "by virtue of the power conferred upon us by said will, and of

every other power us thereto enabling," which Cummings has refused to accept.

He contends that it is impossible to determine, from the words in the deed creating the trust, the extent of the estate vested in the trustees, or of that vested in the *cestui que trust*, the testator, and he suggests only two possible constructions of this instrument: that it may be construed to vest the legal fee of the testator's real estate in the trustees, and the equitable fee thereof in the testator; or to vest only an equitable life estate in the testator, and therefore only a legal estate for the life of the testator in his trustees, which would terminate by his death, so that the entire legal and equitable estates would thereupon vest in the heir at law.

Assuming the former of these constructions to be correct, the argument concedes that the grantor had the right and power at any time to terminate the trust by demanding and receiving from the trustees a reconveyance to himself of the legal title; that, although the trustees had the legal fee vested in them, the whole beneficial interest and equitable title were in the *cestui que trust*, who might dispose by deed or will of the equitable fee as he saw fit. Pub. Sts. c. 127, §§ 1, 24. *Loring v. Eliot*, 16 Gray, 568. *Smith v. Harrington*, 4 Allen, 566, 569. As the testator died without having in his lifetime put an end to the trust created by the trust deed, Cummings further contends that there was a resulting trust of the equitable fee of his real estate to his heir at law, and that the trustees, holding then only a dry trust title, were bound to convey to him. *Easterbrooks v. Tillinghast*, 5 Gray, 17, 21. *Packard v. Marshall*, 138 Mass. 301. Admitting this to be the law where there has been no disposition of the estate by devise, it is equally the duty of the trustees to convey to the devisees where there has been such disposition; and the will must, by necessary implication, be construed as constituting a devise to the executors. If they had received no more than a naked power to sell the real estate, this would not be inconsistent with its descent to the heir. There may be a charge of this nature on the real property in favor of the executor, without implying any estate in him therein. But the will contemplates complete control over the real estate by the executors. They are to have full charge of it, to lease the same

and collect the rents, and, as soon as convenient and profitable, to sell and convey the same to any purchaser or purchasers, at public or private sale, without any order of court or license; "or they may turn over and convey any part or parts of the same in discharge of any devises or bequests herein," &c., "all as in their judgment may appear best." The duties imposed upon the executors could not be discharged, unless the reversion in the real estate is treated as devised to them; and, by necessary implication, the title thereto passes to them. *Walker v. Whiting*, 23 Pick. 313, 317. *Greenough v. Welles*, 10 Cush. 571, 577. *Cleveland v. Hallett*, 6 Cush. 403, 407. It was therefore the duty of the trustees to convey in fee to the executors the real estate held by them, their trust having been completed; and, by the execution of the power vested in the executors by Perry's will, they could make a good title to Cummings.

If it be held that the trust deed vested an equitable life estate in Perry, the same result follows. There was then a resulting trust in his favor in the reversion. *McElroy v. McElroy*, 113 Mass. 509. This reversion, although to take effect only upon his own death, was still an estate vested in him during life, and disposable by will or deed. It passed therefore by the devise to his executors. If it be said, as Cummings does say, that, upon this construction, the trustees took only a legal fee for the life of the testator, and that their estate would terminate by his death, so that the entire legal and equitable interests would, by operation of law, thereupon vest in the heir, this has been prevented by the devise made. Even if the conveyance made by the trustees to the executors was ineffectual, by reason of having no estate to operate upon, it would be superfluous only, and in no way affect their title by virtue of the devise.

Cummings further suggests that the vagueness and obscurity of the terms of the deed of trust give rise to doubt and suspicion as to the purposes and objects for which the trust was created, and as to whether those purposes and objects have been fully attained; and that ulterior purposes and objects for which the trust was created may still exist. But when nothing is shown as to any other trust than that which appears on the face of the deed, when the instruments in writing which affect this estate are before us for construction, when all parties who can

be known to be possibly affected by the decree appear, we cannot refuse to determine the validity of the title because of imaginary doubts whether there was not, under the deed, the possibility of some ulterior undisclosed trust.

*Decree for the plaintiffs.*

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COMMONWEALTH vs. LOAMMI G. RICHARDSON & another.

Middlesex. March 29. — May 12, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

An instrument purporting to be a lease of a great pond, under the Pub. Sts. c. 91, § 12, is not admissible in evidence without proof of the genuineness of the signatures of the commissioners on inland fisheries attached thereto; and a certificate of the Secretary of the Commonwealth, attached to the instrument, certifying that the persons signing the same were at the time such commissioners, and that their signatures are genuine, is not the certificate contemplated by the Pub. Sts. c. 169, § 70, and does not render the instrument admissible in evidence.

A complaint on the Pub. Sts. c. 91, § 27, for unlawfully fishing in a certain pond, need not aver that the pond is a great pond or an artificial pond, nor that the defendant was not lawfully engaged in cultivating or maintaining said fish.

At the trial of a complaint on the Pub. Sts. c. 91, § 27, for illegally fishing in a great pond, it appeared that a lease of the pond by the commissioners of inland fisheries had been made to the inhabitants of the town in which the pond was situated; that the lease was in possession of the town officers, and was recorded in the town records; and that there were repeated votes appropriating money to stock the pond with fish, choosing committees to stock the pond and other committees to look after the pond, receiving and acting on the reports of their fish committees, accepting the rules and regulations made by them for the use of the pond, changing the times of fishing therein, and directing their fish committee to apply for changes to the commissioners. *Held*, that these facts afforded ample evidence, as against the defendant, that the inhabitants were lawfully the lessees of the pond; although there was no formal vote of the town accepting the lease.

At the trial of a complaint on the Pub. Sts. c. 91, § 27, for illegally fishing in a great pond, the defendant is not entitled to a ruling that fishing for any other fish than those which were the only useful fish alleged to be cultivated in the pond would be no offence.

A person who paddles a boat, in which another is fishing in violation of the Pub. Sts. c. 91, § 27, may be convicted of illegally fishing, within that statute, as a participant in the offence.

COMPLAINT on the Pub. Sts. c. 91, § 27, to the First District Court of Eastern Middlesex, alleging that Loammi G. Richardson

and Henry Harnden, on September 14, 1885, at North Reading, "unlawfully did fish in a certain pond there situate in said North Reading, commonly known as Martin's Pond, the whole of said pond being then and there a place where fish, to wit, land-locked salmon, were then and there lawfully cultivated and artificially maintained by the inhabitants of the town of North Reading aforesaid, and they, the said Loammi G. Richardson and Henry Harnden, not then and there having permission from the said inhabitants of said town of North Reading to so fish as aforesaid, and the said inhabitants of the said town of North Reading being then and there the proprietors of said pond and said fish, and said pond not being then and there one of a number not exceeding six in number, which the commissioners on inland fisheries may occupy, manage, and control, and not leased by them for the purpose of cultivating useful fishes and of distributing the same within said Commonwealth, and against the peace of the said Commonwealth, and the form of the statute in such case made and provided."

The defendants filed a motion to quash the complaint, assigning the following grounds therefor :

"1. Because there is no averment that said Martin's Pond is a great pond containing more than twenty acres, or an artificial pond. 2. Because there is no averment that the defendants were not lawfully engaged in cultivating or maintaining said fish, and were thereby the owners."

This motion was overruled. The defendants were tried and found guilty ; and appealed to the Superior Court.

In that court, before the jury were empanelled, the defendants renewed the motion to quash, which motion was overruled.

The defendants were then tried before *Bacon, J.* The jury returned a verdict of guilty ; and the defendants alleged exceptions, which appear in the opinion.

*A. V. Lynde & W. P. Harding*, for the defendants.

*E. J. Sherman*, Attorney General, for the Commonwealth.

DEVENS, J. In order to show that the pond in which the defendants were alleged to have fished was one which had been leased by the commissioners of inland fisheries, the government offered in evidence what purported to be a lease of said pond by them to the inhabitants of North Reading, together with a

certificate of the Secretary of the Commonwealth. This lease bore date on the first day of July, 1880, was produced by the town officers, and appeared to have been recorded in the town records. It purported to be signed by two of the commissioners, and also by five other persons, two of whom were selectmen of the town, and the others members of the committee on fisheries in the town of North Reading. These five latter signatures did not show in what capacity the signers assumed to act. The certificate of the Secretary, under the seal of the Commonwealth, is dated March 16, 1885, and states that, at the date of the lease annexed thereto, the persons whose names are borne on the lease as commissioners were of the board of commissioners on inland fisheries; and "that to their acts and attestations, as such, full faith and credit are and ought to be given, in and out of court, and that their signatures thereto are genuine." There were no subscribing witnesses to any signatures to the lease, nor any evidence of the genuineness of the handwriting or signatures except said certificate. Against the objection of the defendants, the court admitted this lease and certificate as evidence, without further proof of the signatures or genuineness of the handwriting.

The Pub. Sts. c. 91, § 16, provide that the commissioners shall have the custody of all leases that may be made by them under the provisions of that chapter. By c. 169, § 70, "copies of books, papers, documents, and records in the executive and other departments of the Commonwealth, duly authenticated by the attestation of the officer having charge of the same, shall be competent evidence in all cases equally with the originals thereof, if the genuineness of the signature of such officer is attested by the Secretary of the Commonwealth under its seal." That which the certificate of the Secretary is to attest is the authenticity of the signatures of those officers having charge of the document of which copies are to be offered in evidence, and who themselves are to attest the authenticity of the copies. It is as the proper custodians of the document that they attest its authenticity, and not as having themselves executed it; and the Secretary does not attest the signatures of those who signed the original, but of those who now have it in charge. The government did not seek to put in evidence a copy authenticated by



those having the lease properly in charge, and the genuineness of whose signatures was attested by the Secretary under the seal of the Commonwealth. Had it done so, it may be that no proof would have been necessary of the signatures or handwriting of those commissioners who had executed the original lease, or of the town officers. Such a duly authenticated copy of a public document, showing an official act done by commissioners in discharge of a lawful duty, and produced from proper custody, having been made competent evidence, proof of handwriting or signatures is necessarily dispensed with. Such proof would indeed be impossible in relation to a copy. Where an office copy of a deed may be put in evidence, it is not, *prima facie*, necessary to call attesting witnesses, or prove the handwriting of the signer of the original, or its due delivery by him, although the party affected thereby may controvert them. *Samuels v. Borrowscale*, 104 Mass. 207. *Gragg v. Learned*, 109 Mass. 167.

The lease offered in the case at bar was not in the lawful custody of those persons who are now the commissioners of inland fisheries. It had been left in the custody of the town officers, and it was by putting the original in evidence that the government sought to establish its case. It was necessary to establish the fact that at least those who signed as commissioners were such at the date of the lease, and to prove their handwriting. The certificate of the Secretary did not aid in this. If the records of his office enabled him to state who were the commissioners at a former time, when the lease was executed, he may properly certify the record which shows this, but he cannot certify that this fact appears by the record. A certificate from a public officer that certain facts exist, or appear by the records of his office, is not competent evidence of such facts. *Robbins v. Townsend*, 20 Pick. 345. *Wayland v. Ware*, 109 Mass. 248. *Hanson v. South Scituate*, 115 Mass. 336. Nor is the certificate of the Secretary competent upon the question whether the signatures to the original lease are genuine. He is not authorized by law to attest them. As to matters which he is not authorized by law to attest, his certificate is extra-official, can have no higher weight than that of a private citizen, and is therefore inadequate to make the proof required. *Oakes v. Hill*,

14 Pick. 442, 448. The lease offered as an original required some additional proof of its authenticity, and was therefore improperly admitted. For this reason a new trial will be necessary.

We proceed to consider briefly such other questions, raised by the bill of exceptions, as it seems probable may hereafter be presented. The motion to quash the complaint was properly overruled. It followed the language of the statute, and comes within the well-settled rule, that an indictment may be made in the words of a statute, without a particular detail of facts and circumstances, when, by using those words, the act in which an offence consists is fully, directly, and expressly alleged, without any uncertainty or ambiguity. Pub. Sts. c. 91, § 27. *Commonwealth v. Welsh*, 7 Gray, 324. *Commonwealth v. Barrett*, 108 Mass. 302. *Commonwealth v. Tiffany*, 119 Mass. 300.

The defendants further contend that, even if the lease or a proper copy be admitted, the facts do not furnish any evidence that the inhabitants of North Reading were the proprietors or lessees of the pond. There was no formal vote to accept a lease of the pond, but there were repeated votes appropriating money to stock the ponds with fish, there being another pond included in the lease, choosing committees to stock the ponds, and other committees to look after the ponds, receiving and acting on the reports of their fish committees, accepting the rules and regulations made by them for the use of the ponds, changing the times of fishing therein, and directing their fish committee to apply for changes to the commissioners on inland fisheries. These facts, taken in connection with the fact that the lease was in the possession of the town officers, and produced by them at the trial, and appeared to have been recorded on the town records, afforded ample evidence, as against the defendants, that the inhabitants were lawfully the lessees of the pond.

The request for an instruction that fishing for any other fish than land-locked salmon (which was the only useful fish alleged to be cultivated in the pond) would be no offence, should not have been granted. The taking of any other fish there would be illegal. Pub. Sts. c. 91, §§ 12, 24, 27.

The request for an instruction that Harnden could not be convicted on evidence that he was only paddling the boat was

properly refused. The instruction to the jury, "that they might find, from all the facts disclosed in evidence, that these parties were fishing, and they must so find beyond a reasonable doubt in order to convict either of the defendants," was all to which Harnden was entitled. If the only act done by him was paddling the boat, under this instruction the jury must have found that he did this in participation with the illegal act of fishing.

*Exceptions sustained.*

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HENRY KELLOGG, JR. *vs.* SAMUEL TOMPSON.

Suffolk. March 9. — May 20, 1886. W. ALLEN & HOLMES, JJ., absent.

At the trial of an action for the conversion of a promissory note payable to A., signed by B. and pledged to the plaintiff, another note, signed by A. and delivered to the defendant, containing the words "collateral in B's note," was put in evidence by the plaintiff, who was then allowed to show, by the testimony of A., that, in a loan of a certain sum by the defendant to A., which that note represented, nothing was said about the note in suit, and that A. did not know that it was mentioned as collateral in any note he had given to the defendant; and the judge ruled that it "could not be received to affect the right of either party under the note and contract" admitted in evidence. *Held*, that the defendant had no ground of exception.

In an action for the conversion of a promissory note, several months before its maturity, evidence of the financial condition of the maker of the note at its maturity is inadmissible upon the question of damages.

If a promissory note, held in pledge, is delivered by the pledgee to the pledgor for the purpose of procuring it to be discounted, and a third person advances money upon the note, in good faith, and in ignorance of the pledgee's title, he can retain the note, as against the pledgee, as security for the advance; but if such person knew, at the time the note came into his possession, of the pledgee's title, he cannot hold it, as against the latter, either for an advance of money upon it as a loan to the pledgor, or as security for any former indebtedness of the pledgor to him.

If some of the evidence at the trial of an action is conflicting, one party is not entitled to a ruling that, upon the undisputed facts of the case, the jury must find for him, unless the disputed facts were immaterial to the issue.

A party to an action is not entitled to have a request for a ruling granted, which fails to state any proposition of law, but asks for a ruling upon certain facts which the jury may find.

TORT for the conversion of a promissory note for \$3000, dated April 17, 1883, payable six months after date to the order of

William J. Wilson, signed by Charles E. Johnson, indorsed by said Wilson and by Murphy and McCarthy, and pledged to the plaintiff. At the trial in the Superior Court, before *Knoulton*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

*W. E. L. Dillaway*, for the defendant.

*H. G. Allen*, for the plaintiff.

GARDNER, J. 1. On June 16, 1888, Wilson delivered to the defendant a promissory note, signed by him, for \$425, which contained the following: "Collateral in Johnson's note of three thousand dollars, indorsed by Murphy and McCarthy." After this note was put in evidence, the plaintiff was permitted, under the defendant's objection, to show, by the testimony of Wilson, that, in the loan of \$400 by the defendant to Wilson, which was represented by the note of \$425, nothing was said about the Johnson note; and that Wilson did not know that it was mentioned as collateral in any note he had given the defendant. The court admitted the evidence, and ruled that it "could not be received to affect the right of either party under the note and contract of June 16."

The parties to the suit were not the parties to the note and contract. The rule which excludes parol testimony for the purpose of varying or contradicting a written contract is confined to the parties to the contract, or their privies, and does not prevent strangers thereto from introducing such evidence. 1 Greenl. Ev. § 279. *McMaster v. Ins. Co. of North America*, 55 N. Y. 222. *Edgerly v. Emerson*, 23 N. H. 555. *Badger v. Jones*, 12 Pick. 371. The plaintiff was not a party to the note and contract between Wilson and the defendant, and was therefore not bound by it. If it speaks falsely, or fails to speak the whole truth, he is not to blame, and can show the truth, even by the testimony of one of the parties who is legally bound by its terms. We think that the evidence was properly admitted.

2. The defendant offered to show the financial condition of the maker of the note at its maturity, which was several months after its conversion. This related to the question of damages. The measure of damages, in actions of trover, is the value of the property at the time of the conversion. This rule is applicable to negotiable paper. *King v. Ham*, 6 Allen, 298. The evidence

offered had no tendency to show the value of the note when converted, and should not have been admitted.

3. At the conclusion of the evidence the defendant asked for six specific instructions,\* none of which were given. Several of these raise the question as to the legal effect of the delivery of the pledged note by the plaintiff to Wilson, for the specific purpose of procuring it to be discounted. The law is well settled, that an unconditional delivery of pledged property to the pledgor by the pledgee vests in the former the complete title to such property. Continuance of possession is indispensable to his lien, and, when the custody over such property is abandoned, the security upon it is lost. *Homes v. Crane*, 2 Pick. 607. *Bonsey v. Amee*, 8 Pick. 236.

The possession of the pledge by the pledgor may be under such special circumstances as not to divest the pledgee either of title or possession. Thus, where the master of a ship pledged his chronometer to the owners, and they permitted him to keep it on board their ship, and use it for the purpose of navigating their ship for a limited period, it was held that they had not lost their lien. Under the terms of the agreement, it was not a parting with the possession. The possession of the captain was still the possession of the owners. *Reeves v. Capper*, 5 Bing. N. C.

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\* These were as follows: "1. Upon the undisputed facts in this case the jury must find for the defendant. 2. If the jury find that Kellogg gave the note in question to Wilson to sell or get discounted, and Wilson delivered the same to Thompson to secure Thompson for a loan of money made at that time, this would authorize Thompson to hold the note so delivered, and his right so to hold it would be superior to that of Kellogg, and the verdict must be for the defendant. 3. If the jury find that Kellogg delivered the note in question to Wilson to sell or get discounted, and Wilson delivered the note to Thompson as collateral security for the debt named in the note of \$425, dated June 16, 1883, this would be sufficient to entitle Thompson to hold said note of \$3000, and this action cannot be maintained, and the verdict must be for the defendant. 4. As Thompson received the note in question as collateral for the loan of \$425, made June 16, 1883, he is entitled to hold the same, and this action cannot be maintained. 5. According to the statement of Kellogg as to the manner and circumstances under which he delivered the \$3000 note to Wilson, he is bound by the contract embodied in the note of \$425, which Wilson gave to Thompson. 6. If the jury find that Thompson took the note from Wilson, according to the terms set forth in the note of \$425, Kellogg is bound by the act of Wilson, and cannot maintain this action."

136. The pledgee of a bond delivered it to the pledgor for the purpose of his exchanging it for stock, which was to be returned on the next day to the pledgee, as a substituted security. The pledgor converted the bond, and the pledgee maintained trover against him for the conversion. *Hays v. Riddle*, 1 Sandf. 248. This case is cited in *Way v. Davidson*, 12 Gray, 465, where the pledgee of a promissory note, who had delivered it back to the pledgor under an agreement to return it or another note, which he refused to do, was permitted to maintain an action of tort in the nature of trover for the conversion of the note.

If property pledged is delivered by the pledgee to the pledgor, to sell or dispose of as his agent, and account to him for the proceeds, as agreed upon between them, this transaction would preserve the pledgee's title in the property, and would enable him to recover it of any person who wrongfully came into its possession. If, however, the pledgee gives the property to the pledgor to dispose of for himself, upon the promise that, if he sells it, he will give him part of the price received for it, under such circumstances the property would pass into the possession of the pledgor as general owner, and the pledgee's lien would be lost. These principles of law were stated to the jury in unmistakable language.

The instructions given carefully guarded the rights of the defendant upon his claim that the note came into his hands innocently. The jury were instructed, in substance, that, if the plaintiff owned the note in pledge, and entrusted it to Wilson in such a way that Wilson might go into the market and probably mislead people into the belief that he was its owner, and a person in good faith paid him money on the note in the belief that he was the owner, the plaintiff must endure the loss, and the person who received the note under those circumstances could retain it as security for the advances which he made on it; if the defendant advanced money on the note innocently, supposing that it was Wilson's, and having no reason to suppose that anybody else had a claim upon it, he had a right to retain the note as security for an advance so made by him in good faith; if, on the other hand, the defendant knew at the time the note came into his possession that it was pledged to the plaintiff, or that he was its owner, he could not take it, either upon an

advance which he might make upon it as a loan to Wilson, or as security for any former indebtedness to him, and hold it as against the plaintiff.

The first request, that, upon the undisputed facts of the case, the jury must find for the defendant, was properly refused. Much of the evidence was conflicting, and it was the duty of the jury to pass upon all the testimony before them upon the facts disputed and undisputed. It was clearly not the duty of the court to select the undisputed facts in the case, and state to the jury what their verdict should be upon those facts, unless the disputed facts were immaterial to the issue. We fail to find in the report of the case any evidence which required the court to rule as requested.

The remaining prayers for instructions are defective in several particulars. They fail to request the court to instruct the jury upon any proposition of law, but ask for rulings upon certain facts which the jury might find. The instructions given were full upon all the questions raised at the trial, and stated the law clearly and accurately. *Exceptions overruled.*

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### KENNEBEC FRAMING COMPANY vs. RUFUS PICKERING.

Middlesex. Jan. 18, 19. — May 22, 1886. DEVENS & GARDNER, JJ.,  
absent.

A person, who furnishes lumber at a certain price per thousand feet, at different times, under an entire contract, in the erection of a building, loses his lien, under the Pub. Sts. c. 191, § 6, if he neglects to file his statement of the amount due him within thirty days after the last item is furnished which is actually used in the erection of the building.

PETITION, under the Pub. Sts. c. 191, to enforce a mechanic's lien. Trial in the Superior Court, without a jury, before *Knowlton, J.*, who allowed a bill of exceptions, in substance as follows:

The petitioner introduced evidence tending to show the following facts :

The petitioner made a contract in writing, dated March 1, 1884, to furnish to the respondent frame and other building material for a skating rink in Wakefield, at a certain sum per thousand feet. The petitioner commenced shipping this lumber about March 7, 1884, by cars from Fairfield, Maine, to Wakefield. This lumber was furnished to build the rink according to plans and specifications. The last car-load furnished under said contract was shipped on June 12, 1884. It consisted of maple floor boards for the upper hall of the structure, which were to be used in laying such floor according to the original plan and contract; but this floor was not laid, and this last car-load, which was necessary to complete the building as first intended, instead of being so used, was piled up in said building. The last lumber shipped under the contract, except said last car-load, was so shipped on April 24, 1884, and all but said last car-load was actually used in the construction of the building. The lower floor, designed for a skating rink, was finished and occupied on April 30, 1884. The upper floor was never finished or occupied. The petitioner had no knowledge of the failure of the respondent to use this car-load to complete the building for which it was contracted and furnished. The respondent is in insolvency, and his assignees defend this suit. On July 10, within thirty days of the shipping of said last car-load of lumber, the petitioner duly filed in the registry of deeds a certificate of a just and true account of the amount due to it; and the petition to enforce the lien was duly filed within the time required by law.

The judge found that the certificate was not recorded within thirty days of the time of the petitioner's ceasing to furnish materials, within the meaning of the statute, because the lumber of the last car-load, furnished on June 12, 1884, was not used in the building; ruled, as matter of law, that, to entitle the petitioner to enforce a lien, such certificate should have been filed within thirty days from the time of delivery of lumber or material which was actually used in the building; and ordered judgment for the respondent. The petitioner alleged exceptions.

*A. H. Briggs*, for the petitioner.

*F. S. Hesseltine*, for the respondent.



HOLMES, J. When, as here, the price is fixed by the thousand feet, we will assume that a lien can be maintained for materials furnished and actually used, although furnished under an entire contract which calls for a larger quantity, part of which is not actually used. *Felton v. Minot*, 7 Allen, 412. But in *Gale v. Blaikie*, 129 Mass. 206, the court say: "It is clear that the statement of account is intended to embrace only those charges which the lien secures, and that it is to be filed within thirty days after the last of the items charged and secured is furnished. The only 'materials' which are the subject matter of provisions of the statute are materials furnished and actually used." In the opinion of a majority of the court, we cannot fairly distinguish this case from that, consistently with its reasoning, on the ground that the present contract was entire. We cannot reconcile it with that reasoning to say that, when the contract is entire, the materials referred to by the Pub. Sts. c. 191, § 6, are the last materials which are furnished under the contract; and which, although not actually used, must be furnished before a debt can arise in respect of the portion actually used. The language cited imports that the statement must be filed within thirty days of the furnishing of that part of the materials which is actually used, and in respect of which a lien can be claimed. It would be consistent with *Gale v. Blaikie*, perhaps, either to presume conclusively that the last car-load of lumber was used, or to say that that previously delivered was not furnished in the sense of the statute until a debt had arisen in respect of it. But neither of these suggestions commends itself to us, and we must adhere to what has been decided. The hardship seems greater, technically, when the contract is entire, and the petitioner has precluded himself from filing his certificate before complete performance, if that is the effect of such a contract, which we do not intimate. But we doubt if there is much practical difference except when the purchaser refrains from using part of the materials for the purpose of defeating the lien, which is not suggested to have been the fact in the case at bar. *Exceptions overruled.*

## CLARIBELLE D. SHATTUCK vs. WILLIAM S. RAND.

Suffolk. March 25. — May 27, 1886. W. ALLEN & HOLMES, JJ., absent.

In an action for personal injuries occasioned to the plaintiff by the falling of an hydraulic elevator in a building owned by the defendant, while the plaintiff was riding therein, the defendant offered evidence tending to show that, immediately after the accident, the builder of the elevator examined its machinery, valves, and connections, and found them in perfect order, and nothing broken or injured; and that he had examined the shut-off valve in the cellar from time to time, and had always found it in perfect order. The defendant called certain experts, who testified, in substance, that all appliances for safety in general use were connected with this elevator, and were in good order; that they had examined its machinery and connections, and found everything in good working order; that there were no appliances known to them to prevent air from getting into cylinders when the street pipe was opened, except such as were attached to this machine; that the closing of the shut-off valve in the cellar would have no effect on the running of the elevator, as the pipe between it and the cylinders would remain full of water all the time, whether closed or open, owing to the fact that the cellar pipe was lower than the street main; and that they did not consider that there was any danger to hydraulic elevators from opening the street mains. The defendant, among other things, asked the judge to instruct the jury that, "if the elevator had all known safety appliances, and the defendant had no knowledge or reasonable cause to believe that there was any danger from air coming from the street pipe, and an accident happened therefrom, he would not be liable, even if he had knowledge that the water was being shut off." The judge refused to give this instruction. *Held*, that the defendant had good ground of exception.

TORT for personal injuries occasioned to the plaintiff by the falling of an hydraulic elevator in a building in Boston owned by the defendant, while the plaintiff was riding therein. At the trial in the Superior Court, before *Rockwell, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

*N. Morse & H. G. Allen*, for the defendant.

*W. Gaston & D. C. Linscott*, for the plaintiff.

GARDNER, J. The defendant offered evidence tending to show that, immediately after the accident, the builder of the elevator examined its machinery, valves, and connections, and found them in perfect order, and nothing broken or injured; and that he had examined the shut-off valve in the cellar from time to time, and had always found it in perfect order. The defendant called certain experts, who testified, in substance, that all appliances for safety in general use were connected with this

elevator, and were in good order; that they had examined its machinery and connections, and found everything in good working order; that there were no appliances known to them to prevent air from getting into cylinders when the street pipe was opened, except such as were attached to this machine; that the closing of the shut-off valve in the cellar would have no effect on the running of the elevator, as the pipe between it and the cylinders would remain full of water all the time, whether closed or open, owing to the fact that the cellar pipe was lower than the street main; and that they did not consider that there was any danger to hydraulic elevators from opening the street mains.

Among other prayers for instructions, the defendant requested the court to instruct the jury that, "if the elevator had all known safety appliances, and the defendant had no knowledge or reasonable cause to believe that there was any danger from air coming from the street pipe, and an accident happened therefrom, he would not be liable, even if he had knowledge that the water was being shut off." The court refused so to instruct the jury.

The defendant had introduced evidence tending to show that the fall of the elevator was not attributable to any negligence on his part, and that he was not responsible therefor, for the reasons assigned in his prayer for instructions. Although this prayer was defective in the form in which it was presented, it sufficiently informed the court of the law upon which he relied for defence. The attention of the jury should have been called to this claim of the defendant, and the law given them governing the case upon this evidence.

If the accident happened from the shutting off the water from the street main, and if there was nothing to put a man of reasonable intelligence and information on the watch to guard against the water being shut off, and if he did not know, and by the exercise of reasonable care on his part could not ascertain, that there was danger to the elevator by shutting off the water, then the defendant ought not to be held liable for the accident.

The general principles of law as to negligence were properly stated to the jury, but we think that the defendant was entitled to more specific instructions than those actually given. *Hunt v. Lowell Gas Light Co.* 1 Allen, 343. *Shaw v. Boston & Worcester Railroad*, 8 Gray, 45. *Exceptions sustained.*

## ARTHUR F. GOULD vs. EASTERN RAILROAD COMPANY.

Suffolk. March 3. — June 28, 1886. W. ALLEN & HOLMES, JJ., absent.  
GARDNER, J., did not sit.

The owner of a large tract of land laid out streets and passageways over it, divided it into lots, and caused a plan thereof to be made. He conveyed these lots to different grantees by deeds bounding them on the streets and passageways, and describing the lots by measurements which excluded the streets and passageways. The deeds also referred to the plan, and conveyed to each grantee a right, as appurtenant to the lot conveyed to him, to use the passageways in common with the grantor and his assigns. *Held*, that each grantee took the fee to the centre of the street or passageway on which his lot abutted.

PETITION, under the St. of 1873, c. 360,\* for the appointment of commissioners to assess damages for the taking by the respondent of certain land in Charlestown, alleged to belong to the petitioner.

Hearing before *Morton*, C. J., who reported the case for the determination of the full court, in substance as follows:

The land alleged to have been owned by the petitioner consisted of the following passageways and street, namely, the passageway between and parallel with First Street and Second Street; the passageway from First Street to Second Street; the passageway from First Street towards Austin Street; and the whole of First Street.

The plaintiff derived his title to these parcels of land through two conveyances, as follows: On October 19, 1844, the Charlestown Wharf Company quitclaimed to James Gould all its right, title, and interest in and to First Street, in Charlestown, together with all passageways laid out by said company between First Street and Austin Street, and between First Street and Second Street, running between said streets, or parallel to the same, subject to all the rights, privileges, and easements before conveyed to other persons. On April 28, 1870, Gould quitclaimed the same to the plaintiff.

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\* This act authorizes the Eastern Railroad Company to take land in Charlestown, within defined limits, for a freight station, and provides that the damages shall be assessed by a board of commissioners appointed by the Supreme Judicial Court, with a right of appeal from their decision to a jury.

The Charlestown Wharf Company before its deed to Gould was the owner in fee of a large tract of land, including said street and passageways.

The lots of land abutting on said street and passageways were conveyed to different persons by said company before its deed to Gould, by the following deeds :

1. A deed dated October 3, 1838, of several lots, not now in controversy, by reference to a plan of one Barker, and the following: "Also a certain other tract or parcel of land situated in said Charlestown, and being lot numbered seventy-three on said plan, bounded, described and measuring as follows; viz. northwesterly by lot numbered seventy-two on said plan, sixty-nine feet one inch; northeasterly by a common passageway six feet wide, and there measuring twenty-three feet four inches; southeasterly by a new street forty feet wide, called Second Street on said plan, sixty-four feet one inch; and southwesterly by Front Street twenty-three feet four inches, more or less: the northwesterly and southeasterly boundary lines of said last-described lot are parallel and distant from each other twenty-three feet four inches. Also the right and privilege (appurtenant to said lot numbered seventy-three) to pass in, through, and over said last-mentioned passageway in common with said corporation, its successors and assigns, and all others having the like right."

2. A deed dated October 3, 1838, of a parcel of land, described as follows: "Northwesterly by a new street forty feet wide, called First Street on the plan hereinafter mentioned, one hundred and fifty-four feet; northeasterly by Lynde Street, sixty-seven feet; southeasterly by a common passageway six feet wide, and there measuring one hundred and fifty-four feet; and southwesterly by another common passageway six feet wide, and there measuring sixty-seven feet. The above-granted tract of land contains seven lots, numbered sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, on a plan made by Ebenezer Barker, called 'Charlestown Wharf Company, section one,' dated October 3, 1838, recorded with Middlesex deeds. Also a certain other tract of land situate in said Charlestown, containing lots numbered twenty-three and twenty-four on said plan, bounded, described, and measuring as follows; viz. northeasterly by Lynde Street, sixty-seven feet; southeasterly by a

new street forty feet wide, called Second Street on said plan, forty-four feet; southwesterly by lot numbered twenty-five on said plan, sixty-seven feet; and northwesterly by a common passageway six feet wide, forty-four feet. Also the right and privilege, in common with said corporation, its successors and assigns, and all others having the like right, to pass and repass in, through, and over each of said passageways, which right and privilege is appurtenant to each of the above-granted lots."

3. A deed dated June 17, 1839, of a parcel of land, described as follows: "Southeasterly by a new street forty feet wide, called Second Street on the plan hereinafter mentioned, one hundred and ten feet; southwesterly by a common passageway six feet wide, sixty-seven feet; northwesterly by another common passageway six feet wide, one hundred and ten feet; and northeasterly by lot numbered twenty-four on said plan, sixty-seven feet. The above-granted tract of land contains five lots, numbered twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, on a plan made by Ebenezer Barker, called 'Charlestown Wharf Company, section one,' dated October 3, 1838, and recorded with Middlesex deeds. Also the right and privilege, in common with said corporation, its successors and assigns, and all others having the like right, to pass and repass in, through, and over each of said passageways, which right and privilege is appurtenant to each of the above-granted lots."

4. A deed dated May 31, 1843, of a parcel of land, described as follows: "Northwesterly on land of the Commonwealth of Massachusetts, one hundred and fifty-nine feet and  $\frac{2}{10}$ ; northerly on Austin Street; southeasterly on lots numbered one hundred and thirteen, one hundred and twelve, one hundred and eleven, one hundred and ten, and one hundred and nine, on the plan hereinafter mentioned, one hundred and twelve feet and  $\frac{6}{10}$ ; southwesterly on a passageway six feet wide leading into First Street, so called, twenty-one feet; southeasterly again on the end of said passageway, six feet; northeasterly on said passageway, eighty-one feet and  $\frac{3}{10}$ ; southeasterly again on a new street forty feet wide, called First Street, sixty feet; and southwesterly on Front Street by a curved line extending from said Front Street to the land of the Commonwealth aforesaid: the said parcel of land includes lots numbered one hundred and five, one hundred

and six, one hundred and seven, one hundred and eight, one hundred and fifteen, and one hundred and sixteen, on a plan of certain lots of the Charlestown Wharf Company, drawn by S. M. Felton, dated May 15, 1843, and recorded in Middlesex Registry. Also a right of way as appurtenant to the said described parcel of land, and to each of the lots contained therein, in and over the said six-foot passageway leading to First Street, in common with the said corporation and its assigns, and all others entitled to a like right, and all other rights, privileges, and appurtenances to the said parcels of land, or either of them, belonging, be said measurements more or less, or however otherwise the said parcels of land may be bounded or described."

5. A deed dated August 1, 1844, of a parcel of land, described as follows: "Beginning on Front Street, at the southwesterly corner of the tract hereby conveyed, thence running northeasterly and bounded southeasterly by lot numbered seventy-three on a plan of the said company, dated October, 1838, sixty-nine feet one inch; thence running northwesterly, and bounded northeasterly by a passageway six feet wide, laid out on said plan, ninety-three feet four inches; thence running southwesterly, and bounded northwesterly by lot numbered sixty-eight on said plan, ninety-one feet nine inches; thence running southeasterly to the point begun at, and bounded southwesterly by Front Street, being the whole of lots numbered sixty-nine, seventy, seventy-one, and seventy-two on said plan, and containing by estimation seventy-four hundred and seventy-two feet, together with a right to use said passageway and said Front Street in common with the owners of the other lots abutting thereon."

If the various deeds of the Charlestown Wharf Company before that to Gould, dated October 19, 1844, conveyed the fee in the said streets and passageways to the several grantees, the petition was to be dismissed; otherwise, commissioners were to be appointed.

*J. T. Wilson*, for the petitioner.

*F. I. Amory*, for the respondent.

C. ALLEN, J. Where there is a plan, showing a tract of land laid out into streets and passageways, blocks and lots, the blocks and lots are usually defined by lines which are coincident with the outer lines of the streets and passageways, and the

dimensions and boundary lines of the blocks and lots are usually expressed in figures which exclude the streets and passageways. And when in a deed of a lot of land reference is made to such a plan, it is usual to give the dimensions of the lot as shown by the plan. But although in such cases the literal description in the conveyance does not in terms include the grantor's interest in the adjacent streets or passageways, yet the presumption is so strong that a grantor under such circumstances does not intend to retain the fee therein, subject to the right of way, after disposing of all his interest in the land which is subject to exclusive occupancy, that it has come to be established as a rule of law that the conveyance will by implication be held to include one half of such adjacent streets and passageways, if the grantor owns the same, unless there is something further to show a contrary intention.

In *Codman v. Evans*, 1 Allen, 443, enough was found to show such contrary intention, and the passageway was held not to be included in the grant.

In *Motley v. Sargent*, 119 Mass. 231, a case in some particulars much like *Codman v. Evans*, sufficient evidence of such contrary intention was wanting, and the general rule was applied, that, where there is a boundary upon a fixed monument which has width, as a way, stream, or wall, even if the measurements run only to the side of it, the title to the land conveyed passes to the line which would be indicated by the middle of the monument. So in *Clark v. Parker*, 106 Mass. 554, it was held that "the law presumes it to be the intention of the grantor to convey the fee of the land to the centre of the way, if his title extends so far. This presumption is of course controlled, whenever there are words used in the description showing a different intention. But it has been held that giving measurement, in the deed, of side lines, which reach only to the outer line of the way, are not alone sufficient to overcome it." And in *Berridge v. Ward*, 10 C. B. (N. S.) 400, a reference in a deed to a plan annexed, the measurement and coloring of which would exclude the highway, was held not to control the presumption of law that the soil of the highway, to the centre thereof, passes by the conveyance. See also *Walker v. Boynton*, 120 Mass. 349; *White v. Godfrey*, 97 Mass. 472. The grant in such a deed of a right or privilege



to use the passageway or street does not exclude the inference of a grant of one half thereof, because it is designed to show that the grantee shall have a right to use the whole width thereof. *Motley v. Sargent, ubi supra. Peck v. Denniston*, 121 Mass. 17.

Looking at the deeds in the present case in the light of the foregoing decisions, it must be held that they conveyed the fee in the streets and passageways to the several grantees.

*Petition dismissed.*

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WILLIAM A. HAM *vs.* BOARD OF POLICE OF THE CITY OF  
BOSTON.

Suffolk. March 11. — June 28, 1886. W. ALLEN & HOLMES, JJ., absent.

Under the St. of 1885, c. 323, the board of police of the city of Boston cannot remove an officer or member of the police, without assigning a cause for such removal, and giving to such officer or member an opportunity to be heard thereon.

PETITION alleging that, on or about February 18, 1858, the petitioner was appointed to the office of policeman by the mayor and aldermen of the city of Boston, and became a duly qualified member of the police force thereof; that he continued a member of said police force, under the authority of such appointment, until the passage of the St. of 1878, c. 244, which went into effect on May 14 of said year; that, by the provisions of this act, the government of said police force was vested in three commissioners, appointed by the mayor with the approval of the city council of said city, and the members of the then force were continued in office, subject, however, to removal by said commissioners for cause; that the petitioner was continued in his said office by the provisions of said act until the passage of the St. of 1885, c. 323, which went into effect on June 12 in said year; that, by this act, all the powers vested in said board of police commissioners by the St. of 1878, were vested in a board of police consisting of three persons appointed by the Governor of the Commonwealth, with the advice and consent of the

Council, and, by the provisions thereof, the then members of the police force existing at the time of the appointment of said board were continued in office upon the same tenure as before; that the petitioner was continued in office by said act, and held at said time the important office of chief inspector, to which he had been promoted in the year 1880, having, prior to said promotion, filled every other grade of office in said force; that after the passage of said act, Albert T. Whiting, William H. Lee, and William M. Osborne, all of said Boston, were duly claiming to be appointed as a board of police of said city under the provisions of said act, and as such are now exercising the powers of the same; that, on or about August 31, 1885, the petitioner received a communication in writing from said board, requesting him to resign his office as a member of the police force of said city on or before the first day of September next thereafter; that thereupon the petitioner inquired of said board as to the cause of such request, and if any charges had been brought against him, or if it, the board, had any to prefer, but the board refused to give any legal cause, and stated that no charges had been brought, and that they had none to prefer; that thereupon the petitioner refused to resign from said force, and on September 5 said board of police passed an order removing him from said police force, and have since refused to allow the petitioner, although willing, to perform the duties thereof; that, under the powers vested by the statute in said board of police, the board has authority only to remove him from his office of policeman for legal cause; that, in exercising such power of removal, they act in a judicial capacity, and can remove him only after charges have been preferred against him, notice thereof given him in writing, a hearing held thereon, with an opportunity for him to present his defence; that the board has refused so to exercise its power of removal, and has attempted to remove the petitioner summarily, and without any legal cause, and in so doing has exceeded its jurisdiction, and its action towards the petitioner is therefore illegal and void; that the action of said board tends to injure the petitioner's character and reputation; and that, by such attempted removal, if not restrained by this court, he may lose his rights to be retired upon a pension, to which his long years of service make him eligible.

The prayer of the petition was, that a writ of mandamus issue to the board of police of the city of Boston, commanding it to restore the petitioner to said office of policeman, or show cause why it should not do so.

The answer alleged that, by virtue of the powers conferred upon the respondent by the St. of 1885, c. 323, after full consideration and investigation, it passed the following vote: "Boston, September 5, 1885. Voted, that Capt. William A. Hambe and he is hereby discharged from the police force of the city of Boston for inefficiency and lack of confidence on the part of this board, to take effect from date;" and that the petitioner had no right, as alleged in his petition, to be retired upon a pension.

At the hearing, before *C. Allen, J.*, the following facts appeared, and upon them the case was reserved for the consideration of the full court.

The vote of the police commissioners set up in the answer was passed by them without any formal charges being preferred against the petitioner, and without any hearing of him before the commissioners.

By the St. of 1876, c. 16, the Boston Police Relief Association was incorporated, and it passed certain by-laws, under which the petitioner claims to be entitled to certain benefits.

Under a city ordinance of 1876, continued in 1880, a large fund has accumulated, and the petitioner claims to be entitled to certain benefits under the same.

Before the removal of the petitioner, the police commissioners orally stated to him that they did not consider him an efficient officer, and that both they and the public had lost confidence in him, and for that reason they proposed to remove him.

*R. D. Smith & C. A. Prince*, for the petitioner.

*A. J. Bailey*, for the respondent.

*C. ALLEN, J.* This case grows out of the legislation transferring the administration of the police of the city of Boston from a board of commissioners appointed by the city to a board appointed by the Governor of the Commonwealth. It is conceded by the counsel for the respondent, that, under the St. of 1878, c. 244, the board of police commissioners could only remove officers or members of the police department for cause:

and that, before a removal for cause could be made, the party must have had notice and an opportunity to be heard. But it is contended that, under the St. of 1885, c. 323, the new board of police thereby created has power to remove an officer or member without assigning any cause, and without notice or hearing. And this presents the question to be determined.

Section 2 of this statute is as follows: "The board of police shall have authority to appoint and establish and organize the police of said city of Boston, and make all needful rules and regulations for its efficiency. All the powers now vested in the board of police commissioners in said city of Boston, by the statutes of the Commonwealth or by the ordinances, by-laws, rules and regulations of said city, except as otherwise hereby provided, are hereby conferred upon and vested in said board of police." The power of removal which was vested in the board of police commissioners was expressed in the following language in the St. of 1878, c. 244, § 3: "Any of said officers or members of the department may be removed by the board for cause." The same power is given to the new board of police, unless in the act of 1885 it is otherwise provided. It may be at once assumed that it is not necessary that it should be otherwise provided in express terms, if it can be seen from the general purpose and scope of the act that such a change was intended. There is nothing in the act of 1885 which in terms provides that the new board may make such removals without assigning any cause. It is necessary, therefore, to examine and see if such authority is fairly implied. Section 2 provides that the board shall have authority to appoint and establish and organize the police. The apparent purpose of this provision as to appointments was to show that the new board could act without the concurrence of the mayor of the city. Formerly, by the St. of 1878, c. 244, § 3, the appointment of the superintendent of police, the deputy superintendent, and the captains was subject to approval by the mayor. Now, the new board may make all appointments without such approval; that is, when appointments are to be made. The general power to "establish and organize" the police seems to be only a compact and summary way of stating that the power of the old board in these respects is transferred to the new board. The powers of the old board were expressed more at length, and

included the power to establish and organize the police, though these exact terms were not used. There may be some slight variations in details, but in substance and effect this power was vested in the old board; and yet that board had not the power to remove without cause. The power to remove without cause is not, therefore, to be inferred from the authority to establish and organize the police. The use of this phraseology does not imply any larger power in respect to removals than the old board had.

Section 3 of the act of 1885 provides that "the members of the Boston police force in office when the said board of police are first appointed shall continue to hold their several offices until removed or placed on the retired list by the said board; and the present rules and regulations of the board of aldermen for the government of the police shall continue in force until otherwise ordered by said board of police." This is the only provision in the St. of 1885 which makes any express mention of removal from office or placing police officers on the retired list. Looking at this statute alone, no one could tell what is meant by the words "placed on the retired list." If the provision as to removal stood alone, and there was nothing to show in what sense it was intended, it might well be held to imply an absolute and arbitrary power of removal. But in the preceding section express reference is made to "the powers now vested in the board of police commissioners by the statutes of the Commonwealth," and this means by the St. of 1878. And the whole act of 1885 must be construed with reference to the St. of 1878, to which it refers, and which it supersedes. Especially the words "placed on the retired list" can only be understood by looking at the earlier statute, where detailed provision therefor is made; and, since these words are coupled with the mention of removal, a reference to the earlier statute, to assist in ascertaining the meaning of this word also, is naturally suggested. Looking then at that statute, it is found that the authority conferred by § 3 of the act of 1885 is copied literally from § 10 of the act of 1878, making the necessary changes as to the board by which the authority is to be exercised. And in the act of 1878, where it is provided that the members of the police force shall continue to hold office "until removed or placed on the retired list by the

said commissioners," the meaning is "until removed for cause," as provided in § 3 of that act. It thus appears that it was not the design of these words, as used in the St. of 1878, § 10, to confer any power of removal; this power had already been conferred and limited by § 3; and by § 10 it could not have been intended to enlarge the power of removal, so as to authorize the commissioners to remove officers without cause, since that would be plainly inconsistent with § 3; and indeed thus much is conceded. But since these words were literally copied into the St. of 1885, and the meaning of the words "placed on the retired list" must be sought in the St. of 1878, we do not see that it would be a fair construction to hold that the words "until removed" were intended to confer any greater power of removal than would exist under other provisions of the statute.

Looking now at the more general purpose and scope of the St. of 1885, we are not able to find any clear indication that the Legislature intended to confer upon the new board a merely arbitrary power of removal. It was the established policy under the St. of 1878, that the officers and members of the police force should only be removable for cause. Continuance in office is valuable to them, not merely as a means of present support and as a matter of reputation, but because there are incidental pecuniary benefits under the statute and city ordinance, which are referred to in the report. The new board has power to make all needful rules and regulations for the efficiency of the police, for the government and discipline of the department, and generally for its proper administration. It may also remove any officers or members of the department for cause; that is, for such cause as seems to it sufficient, after the party has had notice and an opportunity to be heard in defence or explanation of whatever may be suggested as a cause of removal. No express provision is made for any revision of the determination of the board; and there would appear to be no opportunity for such revision, unless perhaps by the courts, in case of an arbitrary exercise of the power, for a cause which is unreasonable and in law insufficient; as, for example, for refusing to contribute money for political purposes. St. 1884, c. 320, §§ 8, 11. We have nothing to do with the question whether, in transferring the administration of the police to a board of commissioners

appointed by the Governor, it would be better to give a larger power of removal. If such is the policy of the Legislature, it is easy to say so. But, looking at the St. of 1885, c. 323, as it stands, we are unable to see an intention to change the preceding policy in this respect, and accordingly must hold that the petitioner was improperly removed, no hearing having been accorded to him.

*Mandamus to issue.*



JOHN A. ANDREWS & others vs. WILLIAM E. CASSIDY  
& another.

Suffolk. March 29. — June 28, 1886. W. ALLEN & HOLMES, JJ., absent.

The examination of a debtor, who has applied to take the oath for the relief of poor debtors, is "pending," within the meaning of the Pub. Sts. c. 162, § 49, so that the creditor may file charges of fraud against him, until the announcement of the decision of the magistrate, although the hearing of evidence and arguments has closed, and the magistrate has continued the cause for the purpose of considering the questions of law and fact involved therein.

PETITION alleging that the petitioners were copartners having their usual place of business in Boston; that on June 26, 1885, they duly recovered judgment against G. I. Robbins, of said Boston, in the Municipal Court of the city of Boston, on which execution duly issued on June 30; that, after all due and proper proceedings on the same, said Robbins duly appeared before William E. Cassidy, a commissioner in insolvency within and for said county, for the purpose of taking the oath for the relief of poor debtors; that said Robbins was duly sworn, and an examination had in writing, the same being continued over two separate terms; that said written examination was signed by the debtor on July 31, 1885, and the cause or hearing continued to August 11, 1885, by the magistrate, for a consideration of questions of law and of fact in the case; that on said day, the same being the day to which the cause had been continued, and pending the proceedings, no decision having been rendered by the magistrate, and while the case was still open, the petitioners presented to the magistrate charges of fraud against said debtor, the same being in writing and duly sworn

to; and that the same were read, but the magistrate declined to allow the same to be filed, on the ground that the hearing was closed, although no decision had then or has since been given in the cause.

The prayer of the petition was, that a writ of mandamus issue, directing the magistrate to allow said charges of fraud to be filed; and that the debtor be ordered to plead to the same.

The answer alleged, among other things, that, on July 31, said Robbins duly signed and swore to said examination in writing, that witnesses were then and there duly sworn and heard in said proceedings, that arguments were then and there made by the counsel for the parties to said proceedings, and that said commissioner then continued said proceedings to said August 11, for the purpose of considering the questions of law and fact in said cause; that on August 11, and before said commissioner had rendered his decision in said cause, the petitioners presented to him charges of fraud against said Robbins, which charges were in writing and sworn to, and were then and there read; that said commissioner refused to allow said charges to be filed because the same were offered too late, not having been filed or offered for filing at any time pending the examination of said Robbins.

The case was heard upon the petition and answer by *C. Allen*, J., and reserved for the consideration of the full court.

*H. J. Edwards*, for the petitioners.

*S. T. Harris*, for the respondents.

C. ALLEN, J. The only question is whether, within the meaning of the Pub. Sts. c. 162, § 49, the examination of the debtor must be treated as pending up to the time of the announcement of the decision of the magistrate, so that the creditor was at liberty to file charges of fraud at any time before the announcement of the decision, although the hearing of evidence and arguments had closed, and the magistrate had continued the cause for the purpose of considering the questions of law and fact involved therein. And we are of the opinion that such an examination is still pending, until the announcement of the decision. Until then, the cause might have been reopened in the discretion of the magistrate, and further evidence or arguments heard.

*Mandamus to issue.*



SARAH R. FREEMAN, administratrix, *vs.* BENJAMIN S.  
FREEMAN.

Bristol. Oct. 28, 29, 1885. — June 29, 1886. FIELD & C. ALLEN, JJ.,  
absent.

A surviving partner, who has bought all the assets of the partnership except letters patent for a product, and who uses the patent in the manufacture of such product, against the objection of the administrator of the estate of the deceased partner, is liable, upon a bill in equity by the administrator for an account, for one half of the profits of the manufacture and sale of such article, less all costs and expenses incurred therein by the surviving partner, and a fair allowance for manufacturer's profits; but the administrator is not entitled to interest, except from the date of filing his bill.

BILL IN EQUITY to settle the affairs of a partnership, not already adjusted between the parties, including letters patent and other personal property, and for an account. After the former decision, reported 136 Mass. 260, the case was recommitted to the master, the material parts of whose report, together with the facts, appear in the opinion. The case was heard by *C. Allen, J.*, and reserved for the consideration of the full court; such decree to be entered as justice and equity might require.

*J. E. Maynadier*, for the defendant.

*H. J. Fuller*, for the plaintiff.

DEVENS, J. When this case was last before the court, it was held that a bill in equity might be maintained by the administrator of a deceased partner against the surviving partner, to obtain a sale of the letters patent belonging to the partnership, and for an account of the profits received by the surviving partner from the use thereof since the dissolution of the partnership. *Freeman v. Freeman*, 136 Mass. 260. The contract of partnership implies an agreement that all the assets of the firm, including letters patent as well as other kinds of property, shall be used for the common benefit of all the partners, and supersedes the relation which the parties would otherwise sustain to each other as owners together thereof.

By the decree of this court, the letters patent have now been sold, under the authority of a master, who has also made his report, under the order recommitting the matter to him, with a direction "to inquire and report to the court the amount of net

income and profits from the manufacture and sale of said goods and the use of said letters patent," and, in taking said account, to make to the defendant "all just allowances for money and labor expended in carrying on the manufacture and sale of said goods." The master has reported in two forms, so as to show, first, the net income and profits from the manufacture and sale of the goods, embracing both the manufacturer's and patentee's profits; and secondly, the net income and profits derived from the use of the letters patent, or what he terms patentee's profits; one half of which entire profits, or of such patentee's profits, according to the rule which may be adopted, he deems the plaintiff entitled to recover. To each of these findings the defendant excepts, deeming the rule in either case to result in an exaggerated charge against him.

Upon the first theory, the master, having found the price at which the different varieties of ornamental chain (which was the patented article) were sold, has deducted the cost thereof, including in this, in addition to the actual cost of labor and material, "all other expenses of labor, use of capital, salesman, travelling expenses, office rent, insurance, in fact every expense necessary in carrying on the manufacture and sale of goods in the jewelry business." In addition to what is embraced in the cost of the chains, as thus stated, he has added six per cent on the sales as a reasonable compensation to the defendant for his personal services in conducting the business. The cost of all the goods manufactured and sold, as thus ascertained, being deducted from the price at which they were sold, he has allowed to the plaintiff one half thereof, as her share of "the net income and profits of the manufacture and sale of the goods, and the use of the letters patent" from January 1, 1879, to the date of sale of the letters patent, which was the time to be covered by the account. This sum is found to be \$19,676.85. This finding does not appear to do entire justice to the defendant. Although interest upon his capital and a reasonable sum for his personal services are included in the expenditures, yet his capital was at risk, his business energy and skill were taxed alike in the manufacture of the goods and the enterprise with which their sale was pushed; and he was entitled to a fair and reasonable profit in that business which he thus controlled and carried on. Certainly

no one would embark in a business without an expectation of this, and, when successfully conducted, he should be entitled to it as against others, who, even if they had a valuable interest, took no active part therein. Nor should he be deprived of this, even if those who had such valuable interest, by reason of their ownership in or control over a patent used in the business, objected thereto, provided that they were properly compensated for the use of their patent and the profits made thereby.

It is found by the master, that twenty per cent is "the average, usual, and customary profit made by manufacturers of unpatented articles of jewelry." This profit might reasonably have been expected by the manufacturer in any business of jewelry manufacture, if carefully conducted; and it is in evidence that this was so conducted, irrespectively and independently of the advantage derived from the right to use patents. It may be claimed that this profit should be deducted in favor of the manufacturer, and as his proper profit as such, in determining what are the profits derived from the use of the patent.

In this view of the case, the master has caused a deduction of twenty per cent to be made from the sum of \$19,676.85, leaving the sum of \$16,405.91 as the amount to which the plaintiff is entitled as the share belonging to her, it being one half of the income or profits derived from the use of the patent. To the amount as thus found due from him, the defendant objects, as being a much larger sum than that which he should be compelled to pay for the use made by him of the patent; and contends that the master has not adopted any proper basis on which the liability of the defendant should be computed.

According to the report of the master, the defendant contended that "the amount of the net income and profits from the manufacture and sale of said goods, and the use of said letters patent," were to be distinguished each from the other, and the master was therefore to inquire, first, "the net income and profits from the manufacture and sale of said goods, embracing both manufacturer's and patentee's profits;" and secondly, "the net income and profits from the use of the letters patent, or what are termed patentee's profits;" the latter being the excess of profits "over the average, usual, and customary profit obtained by the manufacturer of unpatented articles." The defendant contends,

by his sixth exception, that this is not a fair statement of his position, but no evidence is offered of this. The master's report finds the contrary, and this is final. When, in the same exception, the defendant restates his contention, it is as follows: "that the whole net income and profits included both manufacturer's profits and the net income and profits from the use of the patent, and that the latter obviously could not be more than the difference between the usual and customary manufacturer's profits and the whole net income and profits." The defendant then contends that, in view of certain evidence stated, the net income and profits were merely nominal.

It is much insisted on, throughout the defendant's argument, that he had not succeeded in impressing on the mind of the master that the plaintiff was only to recover for the amount of profits derived from the use of the patent, as distinguished and separated from any which might have been made in any other mode from the manufacture and sale of the patented article; but the report of the master shows that he fully understood this, and has properly dealt with it. Nor does the position appear so abstruse or ingenious that it is not readily to be comprehended by any intelligent person upon being stated. The complaint that the master has not found what profits were derived from the use of the patent, is not justified. Whether he has arrived at his result by the true rule, or whether that claimed by the defendant, which he declined to adopt, is correct, is to be considered; but that, by his second finding, he has determined the amount due solely for profits derived from the use of the patent, is clear. The real difficulty which the defendant has with the report is that the master, in determining the amount of profit derived from the use of the patent, did not adopt the claim made in the fourth exception, as well as in the argumentative portion of the sixth; which was, that evidence should be examined as to the manufacture of certain competing chains, the prices at which they were made and sold, the profits made thereby, and also evidence that the patented chain was not essentially superior, and ascertain and determine thereby that no more than a nominal profit had been derived from the patent. This evidence, as offered, afforded no adequate means of comparison, and was properly disregarded. The article manufactured by others was, even

if similar, still different from that manufactured by the defendant. Even if there was no actual advantage in the article made by the defendant, the value of such an article, purely ornamental, deriving a large part of its value from its mere fashion, for the purpose of sale may have been much greater. In the case at bar, the quantity of the patented chain made and sold by the defendant, the price at which it was sold, and the cost of its manufacture, were determined by agreement of parties. Whether it was better or worse than competing chains, or what effect they had in regard to the sale, or what profits the manufacturers thereof made, were not important inquiries.

The recovery of profits, or rather the mode of ascertaining them in patent suits, appears to have been found one of considerable difficulty in suits against infringers. When the patent is for a process in making an established article, and a definite saving is thus made in the process of manufacture, this saving may properly be the guide as to the profits. *Mowry v. Whitney*, 14 Wall. 620, 653. But the patent in the case at bar was for a product, and not for a process or machine for making a product. It was an improved chain link, made in a way and form described, which could be readily connected with other links so as to form an "ornamental chain for jewelry." That it was of a different structure and fashion from the Nevins chain, which it most nearly resembled, the defendant himself testified, although he states that the difference in style and appearance is but little, and that, at a little distance, they could not be distinguished. Proof that the Freeman chain was really not more valuable than the competing chains made by other manufacturers has no bearing upon the inquiry as to the profits made by the defendant by the use of the patent.

If this were a suit against an infringer of a patent by the owner thereof, the rule appears to be well established, that the profits from the use of the patent would be fairly ascertained by finding the difference between the cost of the articles produced and the amount received from the sales thereof. In estimating the cost, all the elements which go to make up the expenditures in the manufacture and sale are to be taken into account. "Profit," says Mr. Justice Swayne, "is the gain made upon any business or investment, when both the receipts and payments

are taken into account." *Rubber Co. v. Goodyear*, 9 Wall. 788. In the same case, any and all claims for manufacturer's profits were rejected. In *Elizabeth v. Pavement Co.* 97 U. S. 126, the defendants, who were infringers of a patent for the manufacture of a wood pavement, in the computation of profits with which they were to be charged, claimed a profit of twenty per cent in addition to the actual cost of the lumber and other materials and labor. "It is only necessary to state the claim," says Mr. Justice Bradley, "to show its preposterousness." Were the rule against infringers adopted in the case at bar, it is obvious that the first computation made by the master was correct; as in the cost of the chains, which he finds to be thirty-two cents a foot, he has included every necessary expenditure of their manufacture and sale, and has awarded to the defendant as compensation for his personal services six per cent on the sales. It is in the power of the United States court, in suits against an infringer, to award damages in addition to profits, as well as to give the patentee a remedy in damages, if he has been caused injury by the infringement of his patent, even if the infringer has derived no profit from the use of the invention. *Elizabeth v. Pavement Co.*, *ubi supra*. The rule, as against infringers, has been held very strongly, in order that neither directly nor indirectly should any advantage be gained by them, and it has been deemed that to allow even the profits ordinarily made by a manufacturer would be a premium on dishonesty, and an invitation to aggression. *Rubber Co. v. Goodyear*, *ubi supra*.

We do not think the circumstances of this case such as to require an allowance of them to be here excluded. The defendant was the owner of all the assets of the partnership which formerly existed between himself and the plaintiff's intestate, except this patent. They had carried on the business of making ornamental chains under it, and it remained a partnership asset after the sale by which the defendant became possessed of the other assets. He was requested to sell and dispose of it; his right to use it was denied, but he continued to manufacture under it. He can certainly obtain no personal advantage by the use of a partnership asset, which he was bound to manage or dispose of for the best advantage of the partnership estate, which,

as surviving partner, he was to administer. *Freeman v. Freeman*, 136 Mass. 263. The plaintiff, by her bill, claims to be "entitled to one undivided half part of all the net profits derived from the use of said letters patent;" and demands that they be paid over to her. To the profits derived from the use of all the other assets of the firm, the defendant was fairly entitled. The use of this partnership asset was certainly not justified, yet the case is distinguishable from one in which the defendant is found to have embarked in an enterprise necessarily involving an injury to the rights of patentees. He continued to conduct a business already in existence, using therein an asset which had theretofore been used, and which belonged to the partnership. Although conducted for his own benefit, if the advantage he derived from such use is fairly ascertainable, in a suit brought for the plaintiff's half of the net profits thereof, he should not be deprived of the profits attributable to the manufacture of the article in which no assets but his own were embarked. While a trustee or quasi trustee, such as a surviving partner, is to make no profit out of the trust estate, it cannot be said that the whole profits found by the master were those of the asset which the defendant held in trust, when, if he had made an unpatented article of the same general description, there would have been a profit thereon of twenty per cent.

The defendant contends that actual profits can only be recovered, and that these must be definitely shown by the plaintiff. But these are to be shown, as in ordinary cases, by the exhibition of facts from which they can fairly be inferred, such as the difference between the cost of the articles and the price for which they are sold. Indeed, when these show a large apparent profit in the manufacture and sale of an article under a patent wrongfully used, it would seem that the natural order of proof would require that the defendant should show that it was made in other modes, or from other causes, than the use of the patent.

We are, for the reasons above stated, of opinion that the mode of computation adopted by the master in his second finding correctly states the damages which the plaintiff is entitled to recover.

The defendant contends that the moderate sum for which the patent was sold, at the sale under direction of the master, namely, \$1050, shows that the amount charged against him as profits was grossly exaggerated. No such inference can fairly be drawn. The patent had but a few years to run, and it is more than probable that the profitable use of it was well exhausted. It was for an article of fashion in jewelry, and the examination of the accounts shows, as might be expected, that after a few years the sales rapidly diminished.

It is to be considered whether the plaintiff is entitled to interest as computed by the master, or only from the date of this proceeding. The master has, at the conclusion of each year, given to the plaintiff simple interest on the profits of that year to the date of his report. If the defendant had used an article of a definite and permanent value in his business, it would appear that the plaintiff might either demand the fair interest on such value, or the profits which had been made by its use, but he could not expect both. If he had possessed himself of funds belonging to the firm, to her proportion of which the representative of his partner was entitled, and, against the remonstrance of the latter, had mingled them with funds properly his own, the party injured might demand compensation for the use thus wrongfully made of the funds misappropriated, by charging him with full interest thereon. He might do so also where the party thus in possession of funds unreasonably neglected and refused to settle his accounts. *Dunlap v. Watson*, 124 Mass. 305. Where, in a similar case, the party injured demands to share the profits which have been made by the use of her funds, she ought not, in addition thereto, to recover interest thereon.

In the case at bar, no settlement was ever made at the end of the year, nor any sum then found due which should thereafter stand to the credit of either partner. Whether the apparent balance was used, or to what extent it was used, in the subsequent operations, cannot be determined. It may well have been of benefit in these subsequent operations, and thus have increased the profits subsequently made. If the plaintiff receives, without interest except from the date of filing the bill, her full share of the profits made by the use of the patent as



found by the master, irrespective of "manufacturer's profits" and the costs and expenses as allowed to the defendant, she will receive all to which she is entitled.

The general rule, as applied both to trustees and to surviving partners whose relation is fiduciary, and who have wrongfully used funds in the prosecution of a business, is that the party injured may have either the profits actually made, or interest on the funds so used. *Macdonald v. Richardson*, 1 Giff. 81. *Brown v. De Tastet*, Jac. 284. *Wedderburn v. Wedderburn*, 22 Beav. 84. *Crawshay v. Collins*, 2 Russ. 325, 348. *Washburn v. Goodman*, 17 Pick. 519. The patent used in the case at bar had not a definite money value. The plaintiff seeks only to be compensated by the share of the profits made from its use belonging to the estate of her intestate. To calculate the profits annually, and to add interest thereon, in the absence of evidence that such profits were or could be annually set aside and invested elsewhere, would not be just to the defendant.

The result therefore is, that the plaintiff is entitled to recover the smaller sum found due by the master, as one half of patentee's net income and profits, namely, \$16,405.91, with interest thereon from the date of this proceeding.

This is in addition to the half of the amounts collected, and to the half of the property taken at an appraisal by the defendant, to the findings of the master in regard to which there was no exception.

The plaintiff will be further entitled to an order upon the master to pay over to her one half of the net proceeds of the sale of the letters patent.

*Decree accordingly.*

## EDWARD E. MORGAN vs. THOMAS H. CURLEY.

Middlesex. March 2. — June 29, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

If a person, who, upon applying to take the oath for the relief of poor debtors, has entered into a recognizance under the Pub. Sts. c. 162, § 28, commits a breach of the same by departing before the conclusion of his examination, his arrest, two days subsequently, and at a place remote from that of the examination, is illegal.

After the breach of a recognizance, entered into under the Pub. Sts. c. 162, § 28, has been committed by the debtor, in departing before the conclusion of his examination, the magistrate has no power to annex to the execution a certificate authorizing the arrest of the debtor.

In an action for an assault and battery, committed in arresting the plaintiff illegally, he is entitled to recover compensation for the loss of his time, and for the indignity suffered by him.

TORT for an assault and battery. At the trial in the Superior Court, before *Knowlton*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

*J. D. Thomson*, for the defendant.

*S. W. Trowbridge*, for the plaintiff.

GARDNER, J. The plaintiff was under recognizance to "appear at the time fixed for his examination, and from time to time until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon." Pub. Sts. c. 162, § 28. Before the examination was concluded, and before the magistrate had formally decided that the plaintiff was not entitled to take the oath for the relief of poor debtors, and before he had made his certificate to that effect and annexed it to the execution, the plaintiff made default. His departure before the examination was concluded, and before the magistrate had made his certificate, was premature, and was a breach of his recognizance. *Peck v. Emery*, 1 Allen, 463. *Lothrop v. Bailey*, 14 Allen, 514. *Fuller v. Meehan*, 118 Mass. 135.

After the plaintiff had departed, and the condition of the recognizance was broken, the magistrate made the certificate, which was annexed to the execution. By virtue thereof, the

officer arrested the plaintiff after a lapse of two days, at a place remote from that of the examination.

Upon entering into the recognizance, the plaintiff was relieved from arrest under the execution. The arrest could not be renewed while the proceedings in relation to the examination were still pending, nor until they were brought to a close. *Jacot v. Wyatt*, 10 Gray, 236. *Lothrop v. Bailey, ubi supra*. The place of the debtor's examination was the place where he was to attend and abide the final order of the magistrate, and where the officer was to be in attendance to arrest the debtor if the oath was refused. The debtor, by the terms of his recognizance, was to deliver himself up at the time and place of his examination, and not elsewhere. *Lothrop v. Bailey, ubi supra*. The question arises whether the magistrate had power to act in any respect during the absence of the debtor, and after he had made default upon his recognizance. By the common law, a commitment of a debtor on execution is a discharge of the judgment. The statutes of the Commonwealth have materially changed the common law in this respect. *Cheney v. Whitely*, 9 Cush. 289. By these statutes the creditor preserves all his rights and remedies on the judgment, except those of arresting and imprisoning the debtor. But, as Mr. Justice Metcalf said, in *Coburn v. Palmer*, 10 Cush. 273, the common law remains in force in all the cases in which the statutes have not altered it. That case was an action of debt on a judgment, upon which execution had issued. The defendant was arrested, and gave bond for the prison limits, under the Rev. Sts. c. 97, §§ 63, 65, made default, and the bond was forfeited. Upon a suit on the bond, the surety successfully defended upon the ground of infancy. The court say: "The fact, that the surety in the bond was not answerable thereon, does not give the plaintiff any further remedy against the defendant, than if the plaintiff had voluntarily released him from prison, on his giving insufficient security to pay the judgment. . . . The judgment is discharged, and the plaintiff's only remedy against the defendant was on the bond." In *Whitton v. Bicknell*, 3 Allen, 472, the plaintiff argued that the recognizance was a satisfaction of the execution and judgment. The opinion of the court went no further than to say that the recognizance was a bar to any further proceedings

to enforce the collection of the execution; and that the remedy of the execution creditor was upon the recognizance only, citing *Coburn v. Palmer*, *ubi supra*, and *Kennedy v. Dunklee*, 1 Gray, 65.

When the debtor enters into a recognizance in compliance with the statutes, the recognizance takes the place of the execution and the arrest, and remains as security to the creditor. The power of the execution is suspended, until the debtor submits himself to examination, and the magistrate refuses the oath, and annexes to the execution his certificate to that effect. Then, if the officer is present at the place of the examination, and the debtor is there, abiding the final order of the magistrate, the officer is empowered to take him. The recognizance is then of no effect, and the execution resumes its former power. In this way, and in no other, does the execution displace the recognizance. The officer cannot act until he is warranted so to do by the certificate of the magistrate annexed to the execution. After breach of the recognizance, the magistrate has no power to act further in the premises. The execution is *functus officio*. The recognizance stands in its place as the security to the creditor, and his only remedy is by suit thereon.

The instructions to the jury were substantially in accordance with the views we have expressed as to the law. The examination before the magistrate was not concluded when he attempted to make his certificate and annex it to the execution, in the absence of the debtor, and after breach of the recognizance. There was no escape by the debtor, and the officer was not authorized to arrest him at a place other than that of the examination, nor at any place after breach of the recognizance.

As the defendant had no authority to arrest the plaintiff, the latter is entitled to recover compensation for the loss of his time, and for the indignity he has suffered. *Smith v. Holcomb*, 99 Mass. 552.

*Exceptions overruled.*

ANSON G. STANCHFIELD *vs.* CITY OF NEWTON.

Middlesex. March 9. — June 29, 1886. W. ALLEN & HOLMES, JJ., absent.

In an action of tort against a city for flooding the plaintiff's land, the plaintiff's evidence tended to show that the defendant constructed a drain along a street, and thence through a private way to a catch basin near the rear of the plaintiff's land; that the object of the drain was to carry off surface water, a portion of which naturally ran away from the plaintiff's land; that in the rear of this land was a small brook or ditch; that the water in wet seasons overflowed the catch basin, rose to the surface of the ground, ran into the brook, and did the injury complained of; and that the ditch or brook ran under a street through a culvert which was insufficient in size and choked up, and thereby water was backed upon the plaintiff's land. The evidence for the defendant contradicted the facts and causes of damage alleged by the plaintiff. The plaintiff asked the judge to instruct the jury that the defendant could not lawfully collect water not naturally coming near the plaintiff's land, and, conducting it by an artificial channel, precipitate it upon his land; that, if the ditch was a natural watercourse, the defendant was bound to make a suitable culvert for it under the street, for the passage of water which might naturally come there or be brought there by the defendant's acts; that, if the culvert had been maintained by private persons for more than twenty years, it was the duty of the defendant to see that it was not obstructed, even if the waters were not those of a natural stream. The judge declined so to rule, and instructed the jury that the defendant had no right to go beyond the limits of its highways for the disposal of surface water, without the permission of the adjoining proprietors; that, if the owners of the private way assented, the defendant might place the drain therein, and, with the assent of the owners of the land, conduct the water to the ditch and culvert, and the plaintiff could not complain unless he was a riparian proprietor on the brook; that, if the plaintiff was not such proprietor, he could not complain that the brook was so interfered with that the water which flowed into it could not flow out of it; and that, if the defendant improperly constructed the drain, and so negligently maintained it, either by itself or in connection with the culvert, that the plaintiff sustained an injury, he could recover. *Held*, that the plaintiff had no ground of exception.

If the testimony of a witness is contradicted, no exception lies to the refusal of the judge to instruct the jury what their verdict should be if they should believe the testimony of the witness to be true.

No exception lies to the refusal to give an instruction in the language requested, if it is given in substance.

Mere surface drainage over one tract of land to another, through a ditch, does not constitute a watercourse.

In an action, begun in the fall of 1882, for an injury occasioned by flooding the plaintiff's land in the spring of 1876, and in 1877 and 1878, evidence of the flowage or damage done in the spring of 1876 is properly excluded, the claim being barred by the statute of limitations.

TORT for injuries sustained by the plaintiff, alleged to be caused by acts of the defendant, whereby the plaintiff's land,

cellar, and kitchen were flooded in the spring of 1876, his land in 1877, and his land, cellar, and kitchen in 1878. Writ dated October 10, 1882.

At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

*E. W. Cate*, for the plaintiff.

*W. S. Slocum*, for the defendant.

DEVENS, J. The plaintiff sought to recover upon two distinct grounds. First, that, being a riparian proprietor upon the brook, watercourse, ditch, or drain, (for it is called by all these names,) which flowed in the rear of his premises, he was entitled to the natural flow of water therein, and that such flow had been greatly increased in volume, and rendered foul, by the acts of the defendant; and, secondly, that, even if not a riparian proprietor, he was injured by the imperfect construction of the drain through Maple Place, by which the water from Church Street was intended to be conducted to the brook, and also by the defective preparation of the line of the brook, considered with reference to its channel, the means of discharge from it by a culvert, and the drainage brought to it, the land of the plaintiff in the vicinity having been overflowed, and injury to him thus occasioned.

There was evidence on behalf of the plaintiff, that a drain-pipe had been extended along Church Street in the city of Newton for some seven hundred feet, whose only object was the collection of surface water; that the natural drainage of a portion of the territory was in a different direction from the plaintiff's premises; and that in the rear of the plaintiff's premises was a small brook or ditch. Whether it was a natural watercourse or not was in dispute, and also whether it was entirely outside of and beyond the plaintiff's premises. There was further evidence that the drain in Church Street was connected with another drain-pipe, through which its waters passed, one hundred and eighty feet in length, that extended through Maple Place, a private way, by leave of the proprietors thereof, and terminated in a catch basin, from which water passed by overflow to the plaintiff's premises; that this drain-pipe, at the time of the injuries of which the plaintiff complains, did not

extend to the brook or ditch; and that, the only connection being by a discontinued blind drain of rubble-stone and dirt, the water by reason of the flowage in rains or wet seasons rose to the surface, and spread over the plaintiff's land.

There was further evidence that the land of the plaintiff had been flooded by the overflow of the brook or ditch, and that there was no sufficient outlet for the same; that the only outlet provided was by a culvert under Centre Street, which was insufficient, and which had also been permitted to become choked up; that, further, there was a drainage of surface water, not naturally coming there, near Centre Street; and that thus back water had been thrown upon the plaintiff's land.

The evidence on behalf of the defendant more or less contradicted the said facts and causes of damage alleged by the plaintiff.

The second, third, and fourth requests for instructions were, in substance, that the defendant could not lawfully collect from a great extent of country water not naturally coming near the plaintiff's land, and, conducting it by an artificial channel through a private way, precipitate it upon the rear of his lot, with force and volume increased by the mode in which it was conducted and the extent of country from which it was drawn.

The seventh, eighth, and ninth requests for instructions were, in substance, that, if there was a natural watercourse or ditch, running in the rear of the plaintiff's premises, which passed across Centre Street, the defendant was bound to make there a suitable culvert for the passage of the water which might naturally come there, or which might be brought there by the defendant's acts and doings, as by the construction of a drain through Maple Place, and further to provide that it should not be obstructed; that, if there was a culvert maintained by private persons for more than twenty years, it was the duty of the defendant to see that it was not obstructed, even if the waters were not those of a natural watercourse; and also that, if by neglect in these respects the water overflowed or was thrown back upon the plaintiff's premises, the defendant was responsible.

These last requests are apparently intended to present the inquiry as to the rights of the plaintiff, even if it be assumed that he was not a riparian proprietor. The requests do not

clearly distinguish between the two grounds upon which the plaintiff was entitled, upon the evidence, to present his case, and it would have been impossible to give them precisely as asked. In the instructions as given, this distinction was carefully made by the presiding judge, and it is to be considered whether, as given, they accurately and sufficiently cover the case as presented.

The first portion is devoted to considering the rights of the plaintiff as a riparian proprietor upon the brook. They hold that the city has no right to go beyond the limits of its highways, without the permission of the adjoining proprietors, for the disposal of its surface water; that, with the assent of the owners of Maple Place, it might conduct the surface water by a drain therein, and, with the permission of the owners of the land through which the watercourse or ditch ran, might lawfully conduct such drain into the ditch, and so on to the culvert; that of all these acts the plaintiff would have no right to complain, unless he was a riparian owner, and thus had a right to the regular flow of the waters of the brook. They conclude by saying: "If you find that the plaintiff had no right in the brook as the owner of one of its banks, or because it was the boundary of his estate, and the city of Newton made a drain to carry off its surface water upon Church Street, continued it into Maple Place by the permission of the owners of Maple Place, and continued it then to Centre Street by permission of the owners of the land through which the brook passed, then the plaintiff cannot complain and make it a cause of injury that the brook or watercourse was so interfered with that the water which flowed into it could not flow out of it."

These instructions relate only to the claim of the plaintiff as a riparian proprietor, and show that, if not so, he is not entitled to complain of mere interference with the waters of the brook, or increase in their volume. They are irrespective of the rights which the plaintiff had as a landowner whose lands were remote from the brook or not immediately bordering on it, which are dealt with in the subsequent sentence. While they are negatively expressed, and state in what cases a party cannot recover, unless a riparian proprietor, for mere interference with the waters of the brook, that he may do so for this, if a riparian



proprietor, is clearly shown, especially when they are taken in connection with the earlier portion of the charge, which states that, if the plaintiff was a riparian proprietor, "he had rights in that watercourse which gave him a cause of action against any person who prevented the flow of water in that watercourse, or the flow of water from his land by that watercourse, or befouled the water of that watercourse."

These instructions give the plaintiff all that he was entitled to upon this part of the case. Even if we assume the contention of the plaintiff, that the defendant had not a right to collect the water from a larger area than was naturally drained by way of Church Street, of which there was some evidence, or then to conduct it by and through the lands immediately adjoining the highway into the brook, these acts of themselves afford no ground of complaint to any one except the owners of the land or riparian owners of the brook.

If, in doing these acts, injury is done to others than riparian proprietors by the defective constructions adopted or defective preparations made, so that their lands are overflowed or nuisances to them are created, a different ground of action is presented, which is dealt with in the subsequent part of the instructions. These were, "If—and this is entirely irrespective of any question of his rights in the brook—the city so improperly constructed this drain through Maple Place or the line of the watercourse, and so negligently kept it in repair and maintained it, either considered as a thing by itself, or considered in its connection with Centre Street, the culvert under it, and the drainage of land in that direction towards it, and did these things to the injury of the plaintiff, he might recover, not because he has any right in the brook, but because the city, in disposing of their water, lawfully, as long as it was properly done, had acted unlawfully and wrongfully in the construction and maintenance of their drain, and in the repair and maintenance of it."

These instructions certainly entitled the plaintiff to recover if the drain through Maple Place was not properly constructed by being directly connected with the brook, but emptied into a cesspool which did not permit the waters to percolate through with sufficient rapidity, or was insufficient to contain them, so that they spread over the plaintiff's land in the vicinity to his

injury, or was so negligently kept in repair and maintained that the same result followed. They permitted him also to recover if the line of the watercourse was thus improperly constructed or negligently maintained. The plaintiff contended, that the culvert was insufficient to carry off the water naturally coming to the brook, or which might be brought there by the defendant, and that, whether this ditch was or was not a natural watercourse, the defendant must maintain it of sufficient size to carry off the water; and if insufficient, or permitted to be obstructed so that the water was flowed back upon the plaintiff's premises to his injury, he was entitled to recover therefor. The instructions do not in terms state that the culvert should be sufficient to carry off the water there naturally flowing, and that brought into the brook; but the expression "the line of the watercourse" must have been understood by the jury as meaning the whole of the line by which the water was to be carried off, including the culvert. The jury were told that this must be considered "in its connection with Centre Street, the culvert under it, and the drainage of land towards it." The plaintiff having offered evidence that there was a drainage of water near Centre Street not naturally coming there, which might of course swell the volume of water to be there disposed of, this fact was to be regarded in determining whether it was a proper construction. The jury were further told that, while the city might dispose of its surface water, so long as it was properly done, any improper construction occasioning injury to the plaintiff would be a wrongful act, for which he could maintain an action. That the line of the watercourse would be improperly constructed if not provided with proper means of discharge, needs no argument, and this is contemplated by the instruction which requires it to be considered in connection with the culvert, etc. The whole of the instructions are not given in detail. They do not take up, except in a general way, the various facts upon which the plaintiff contended that the defendant was guilty of negligence in regard to its arrangement for disposing of the water brought into the brook. It is quite probable that, at the trial, the remarks of the judge were amplified, and applied to each of them. But, as stated, they fully cover these facts in a manner which must have been comprehended.

The exceptions we have considered should therefore be overruled. Those that remain may be more rapidly disposed of. The first request singles out the testimony of a single witness, whose evidence was contradicted, and requests an instruction to the jury as to its effect. This might properly be refused. *Bailey v. Bailey*, 97 Mass. 373. *McDonough v. Miller*, 114 Mass. 94.

The fifth request was given in substance, as the plaintiff was permitted to recover if, as he alleged, by reason that the drain through Maple Place did not connect with the brook, and thus the water conducted by it to the cesspool spread over his land to his injury.

In answer to the sixth request, the presiding judge correctly defined a watercourse. *Parks v. Newburyport*, 10 Gray, 28. *Dickinson v. Worcester*, 7 Allen, 19.\*

The tenth request was as to the effect of the negligent construction or maintenance of the drain by the defendant, and was fully considered with the seventh, eighth, and ninth requests.

The question whether the plaintiff could be permitted to prove flowage or damage in the spring of 1876, or whether his claim therefor was barred by the statute of limitations, is not important in the view we have taken of the other exceptions, as the evidence relied on was of a similar character; but the evidence offered was properly excluded.

*Exceptions overruled.*

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\* The sixth request for instructions was as follows: "To constitute a watercourse in law, it is not necessary that it should at all seasons of the year contain water; but if it has a regular channel and well-defined banks, discharging itself into some other stream or body of water, it is sufficient in law to constitute it a watercourse, though the quantity be very small and the flow not constant."

The instruction of the judge was as follows: "To constitute a watercourse, water must usually flow in a certain direction, and by a regular channel, with banks and sides. It may be dry at times, but it must have a well-defined and substantial existence. To constitute a watercourse, there must be something more than a mere surface drainage over one tract of land on to another, occasioned by unusual freshets or other extraordinary causes. The flowing, through a ditch, of water which has accumulated from rains, or the melting of snow, or the under-drainage of land, would not constitute a natural watercourse."

THOMAS A. RICH & others vs. DEXTER L. CRANDALL.

Suffolk. March 9. — June 29, 1886. W. ALLEN & HOLMES, JJ., absent.

S., the owner of S.'s express, sold the business to A., who leased it, for a certain sum monthly, to B., who continued to conduct the business, under the lease, in the name of S.'s express. C., who was employed in the business before the sale to A., continued in the service of A., and of B. afterwards; and as such servant, after the lease to B., received from D., who had dealt with him while he was employed by A., goods to be delivered to persons ordering them through said express, the price of which was to be collected and returned to D. The price of the goods was collected, but was not accounted for to D., who brought an action against A. to recover the same. D., who was notified by S. of the sale to A. soon after it took place, never saw A., or had any actual notice of the lease to B., or of his conducting the business under the lease. Although that fact was published in a newspaper and announced in circular notices sent by B. to persons dealing with the express, D. never received the newspaper or circular. The orders on which the goods were delivered to C. bore the printed heading, "S.'s express, B. agent." *Held*, that, on these facts, the judge, who tried the case without a jury, was warranted in finding for the defendant.

CONTRACT against the defendant as a common carrier, for failure to collect and return the value of goods entrusted to him for delivery; with a count for money had and received. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The plaintiffs do business under the style and name of the New England Oyster Company, in the city of Boston, and the transactions out of which the plaintiffs contend that the cause of action stated in their declaration arose were between them and Smith's Express, running between Boston and Exeter, New Hampshire; and those transactions consisted in the bringing of orders for oysters to the plaintiffs from persons in Exeter by said express, upon which orders oysters were delivered to said express, with directions to collect in cash the price of the same on their delivery in Exeter to the persons who had ordered them.

In September, 1882, Daniel B. Smith, the owner of Smith's Express, sold the route, good-will, and property of the same to the defendant. The business, however, continued to be conducted in the same name after said sale, and Smith continued to conduct the same for the defendant for about a month; and while so conducting the same, and on an occasion while presenting

orders for said express, he notified the plaintiffs of the sale to the defendant, and that he, Smith, was then in the defendant's employ. At the expiration of said month, Smith was succeeded by one John H. Orr, Jr., who continued to conduct the same under the same style of Smith's Express, on joint account with the defendant, under an arrangement that, when the current profits and expenses of the express could be approximately ascertained, Orr was to receive from the defendant a lease of the teams, horses, etc., and good-will of said express, upon a rent payable monthly. In pursuance of this arrangement, the defendant and Orr, in March, 1883, settled between themselves the business of said express to that time; and, on April 1, 1883, the defendant leased to Orr, upon a rental of twenty dollars per month, said express, and all property used in conducting the same; and thereafter Orr conducted said express under said lease in the same name of Smith's Express, and was so conducting it at the time of the transactions on which the plaintiffs seek to recover from the defendant.

One Safford was a servant of said express before the sale from Smith to the defendant, and continued in its service afterward, dealing with the plaintiffs while said express was conducted by Smith for the defendant, and continuously during the oyster season, that is to say, from September to May, and so remained while the express was conducted by Orr under the lease before mentioned. As such servant, Safford was authorized by the person or persons severally conducting the same to represent said express, and, as such representative, brought to the plaintiffs orders from persons in Exeter for oysters, received the same from the plaintiffs to take to Exeter, and deliver on payment in cash of the price by the persons ordering them, and did so take and deliver oysters, and receive in cash the price of them, in the several instances mentioned in the plaintiff's bill of particulars, and this money was, by no default of Safford, never turned over to the plaintiffs. The money thus received and not accounted for, the plaintiffs seek in this action to recover of the defendant.

The plaintiffs never saw the defendant, nor had any business transactions personally with him, and never had any actual notice of the lease to Orr, nor of Orr's conducting said express

under said lease. Although the fact was so stated in the reading columns of a newspaper published in Exeter, and circular notices to the same effect were issued by Orr, and distributed among persons with whom said express transacted business, neither said newspaper nor circulars were ever received by the plaintiffs. The orders on which said oysters were delivered to Safford bore a printed heading, "Smith's Exeter Express, J. H. Orr, Agent." By the contract of lease between the defendant and Orr, the defendant had no interest in the profits, and was not to be responsible for the losses of said express, from April 1, 1883, to the time of this action.

The judge ruled that, upon the facts above stated, the same being found by him, this action could not be maintained; and found and ordered judgment for the defendant. The plaintiffs alleged exceptions.

*J. B. Lord*, for the plaintiffs. 1. The case finds that the plaintiffs dealt with Smith's Express through its agents and representatives, while the defendant was its proprietor, they having notice that he had become so. It is immaterial whether said notice was given by the defendant personally, or by his authorized agent. Story on Agency, § 135. The case further finds that, although the defendant had parted with his interest in the business by a lease of the same to one Orr, the plaintiffs had no actual notice of the fact. On the contrary, the same style of conducting the business was retained, the same person, Safford, was continued in service, and the orders on which the merchandise was delivered bore a printed heading describing said Orr, not as proprietor, but merely as agent. Safford then was held out to the plaintiffs by the defendant, through his agent or manager, as his agent to get goods, in the name of Smith's Express, on the defendant's account. His acts bind his principal as to third persons who have known of his agency, until notice of its revocation is made known to them. Story on Agency, § 470. *Packer v. Hinckley Locomotive Works*, 122 Mass. 484.

2. The defendant in this case adopted and sanctioned the name of Smith's Exeter Express as indicative of his contracts, and, having done so, is liable in the same manner as if he had used his own name. *Melledge v. Boston Iron Co* 5 Cush. 158, 174. Having done so, he remains liable to persons who acted

with him while doing business under that name, until notice that the name no longer meant him, but some other person.

*F. F. Fay*, for the defendant.

C. ALLEN, J. The defendant had not been Safford's employer or principal, in point of fact, for several months before the transactions now in question, and cannot be charged in this action without proof that the plaintiffs had a right to regard him as such employer or principal, and did in fact honestly and in good faith so regard him, and give credit to Safford relying on the defendant's responsibility. But it is not found as a fact, and there is no legal presumption from the facts which are found, that the plaintiffs dealt with Safford under the belief that he was acting for the defendant, or that they relied on the defendant's credit to make good Safford's undertakings. It does not appear that the plaintiffs were misled by the defendant's conduct or silence into believing him to be the real party in interest behind Safford in conducting the business at the time referred to. Inasmuch as the facts found do not show that the plaintiffs were entitled to recover, judgment was properly ordered for the defendant. See *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Wright v. Herrick*, 128 Mass. 240.

*Exceptions overruled.*



LEVI M. BATES & others *vs.* JOSEPH YOUNGERMAN  
& another.

Suffolk. March 9. — June 29, 1886. W. ALLEN & HOLMES, JJ., absent.

In an action against A. and B. for the conversion of certain goods, evidence is inadmissible, under the Pub. Sts. c. 78, § 4, of oral representations or assurances made by B., in regard to the credit and pecuniary responsibility of A., that A. might obtain credit of the plaintiff, for the purpose of showing that the plaintiff was fraudulently induced to sell the goods in question to A.

In an action against A. and B. for the conversion of certain goods, the plaintiff's evidence showed that A. was introduced to the plaintiff by B., who had previously bought goods of the plaintiff, as a person desirous of buying goods of the plaintiff on credit; that A. then signed, in B.'s presence, a written statement, showing his assets and liabilities, and B. also made to the plaintiff oral representations in regard to A.'s pecuniary responsibility; that the plaintiff, relying

upon the statement and these representations, sold the goods in question to A. on a credit of thirty days; that B was present during the sale, and assisted in the selection of the goods by A.; that a bill of parcels was made out to A., and the goods were shipped, according to A.'s directions, in a case marked with his name, to his place of business; that the plaintiff afterwards saw the goods exposed for sale, and the case in which they were shipped, unpacked, in B.'s shop; that, at the end of the thirty days, A. was unable, when called upon, to pay for the goods; and that B. refused, upon demand, to pay for them. *Held*, that there was no evidence of a conversion by A. and B., jointly or severally.

TORT for the conversion of certain personal property. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows:

Asa D. Dickenson, a witness for the plaintiffs, testified as follows: "I reside in New York, and am manager of the credits of the plaintiffs' firm in that city, and have been in their employ four years. The plaintiffs do business under the firm name of Bates, Reed, and Cooley, as importers and jobbers of dry goods, in Broadway, New York. I have known Marks Rubinouvz, one of the defendants, about six months; he has been a customer of the plaintiffs for about that space of time; the defendant Youngerman I never knew until October 18, 1881, and on that day he was introduced to me by Rubinouvz, who stated that Youngerman was desirous of purchasing goods of the plaintiffs on credit, and Youngerman there made in the presence of Rubinouvz, a written statement.\* After the statement was made and signed, I gave the defendant Youngerman a line of credit, relying solely on said statement, and the oral representations or assurances of the defendant Rubinouvz, hereinafter referred to. Both defendants then went out with Howard Crosby, one of the plaintiffs' salesmen, to select goods. Afterwards, the defendants informed me that the defendant Youngerman had selected and purchased goods of the plaintiffs to the value and amount of \$249.55, which Youngerman wished to have delivered to the Providence and Stonington Steamship Company in a case directed to him at 37 North Bennet Street, Boston. Said goods belonged to the plaintiffs prior to the sale, and the defendant Youngerman bought them for the purpose of peddling in and

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\* The statement, which was put in evidence, was signed by Youngerman, and purported to be "as a basis for present and all future purchases," and stated his assets as \$2000, and his liabilities as \$300.



about Boston, according to his statement. I have no personal knowledge of any of the shipments from our house."

The bill of sale of the goods was put in evidence, showing a sale to Youngerman on a credit of thirty days.

Howard Crosby, a witness for the plaintiffs, testified as follows: "I reside in New York, and am a salesman in the employ of the plaintiffs, and have been since 1880. I know both of the defendants, but never, to my recollection, met either prior to October 18, 1881. They were then introduced to me by E. C. Mitchell, a salesman for the plaintiffs. On October 18, 1881, a bill of goods was sold by me, for the plaintiffs, to the defendant Youngerman. Both defendants were present at the time, and the goods were mostly selected by the defendant Rubinouvz, but the sale was made to the defendant Youngerman. The said goods, previous to the sale, were owned by the plaintiffs. The defendant Rubinouvz gave directions as to the kind and quality of the goods purchased, and in most instances selected the specific goods taken by the defendant Youngerman. E. C. Mitchell was present a portion of the time during the sale."

E. C. Mitchell, a witness for the plaintiffs, testified as follows: "I reside in Boston; in 1881, was a salesman for the plaintiffs, and was in their store, October 18, 1881, and there met the defendants. The defendant Rubinouvz stated that the defendant Youngerman was desirous of purchasing goods from the plaintiffs, on credit. I had known the defendant Rubinouvz for about a year. I told him that Dickenson was the party to see about credit. They then went to Dickenson, and soon after returned into that part of the store where I was, and I saw them with Crosby, and I saw him go around with them. I saw the defendant Rubinouvz selecting most of the goods, and heard him tell Youngerman to take certain goods which he pointed out at different times. The goods were cashmeres and shawls. A few days after shipment from New York, I saw most of the goods, to wit, all the cashmeres, in the store of Rubinouvz, in Salem Street, Boston, on the shelves for sale. I saw the case marked 'Joseph Youngerman' in his store, unpacked. I knew the goods by the marks, and by what I had seen them select. At the end of the thirty days I went to the defendant Youngerman's place in North Bennet Street, which

was a dwelling-house, and saw no goods there of any kind. I asked him about paying for the goods, and he said he did not have anything to pay with. I went to the defendant Rubinouvz, and asked him for payment for the goods, and he said to me, 'I did not buy the goods.' Then I said, 'Well, you have had the goods; there are some of them now on your shelves.' I pointed to them. He then said, 'Well, I shall not pay for them.'"

The plaintiffs offered evidence of oral representations or assurances made by the defendant Rubinouvz, on October 18, 1881, in regard to the credit and pecuniary responsibility of the defendant Youngerman, that Youngerman might obtain credit, for the purpose of showing that they were thereby fraudulently induced to make the sale to Youngerman. But the judge ruled that said evidence, the statement not being in writing, was inadmissible. The judge ruled also, that, upon the evidence, the action could not be maintained; and directed the jury to return a verdict for the defendants. The plaintiffs alleged exceptions.

*H. Dunham*, for the plaintiffs.

*J. H. Sherburne & H. N. Sheldon*, for the defendants.

GARDNER, J. The plaintiffs offered oral representations or assurances made by the defendant Rubinouvz, in regard to the credit and pecuniary responsibility of the defendant Youngerman, that Youngerman might obtain credit. This was offered for the purpose of showing that the plaintiffs were fraudulently induced to make the sale to Youngerman. This evidence comes within the provisions of the Pub. Sts. c. 78, § 4. The false representations were made concerning the defendant Youngerman, with an intent to induce the plaintiffs to part with their property to Youngerman on credit. This is within the prohibition of the statute. *Kimball v. Comstock*, 14 Gray, 508. *Wells v. Prince*, 15 Gray, 562. *Mann v. Blanchard*, 2 Allen, 386. *McKinney v. Whiting*, 8 Allen, 207. In their offer of proof, the plaintiffs did not go far enough to take it out of the limitations of the statute.

At the time of the sale, the defendant Youngerman, in the presence of Rubinouvz, made a written statement "as a basis of credit for present and all future purchases." The manager of

the plaintiffs' firm in New York testified that, "after the statement was made and signed, I gave the defendant Youngerman a line of credit, relying solely on said statement and the oral representations or assurances of the defendant Rubinouvz." These representations or assurances were rightly excluded, as we have already shown. There is nothing in the bill of exceptions to show that any part of the written statement was untrue. It is difficult to see what evidence of misrepresentation or fraud was laid before the jury to show a conversion of the plaintiffs' property by the defendants, or either of them.

If the property was obtained from the plaintiffs by the defendant Youngerman under the form of a sale, but in fact by misrepresentation and fraud, and the defendant Rubinouvz obtained it of Youngerman with knowledge of the fraud, the plaintiffs could maintain trover for it, because the possession both of Youngerman and of Rubinouvz was wrongful, and constituted a conversion. *Stevens v. Austin*, 1 Met. 557. In the case at bar, we find no evidence of a conversion by the defendants, jointly or severally.

*Exceptions overruled.*

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#### ISAAC T. KELLOGG *vs.* FRANCIS N. KIMBALL & others.

Suffolk. March 4. — June 30, 1886. W. ALLEN & HOLMES, JJ., absent.

If the declaration in an action contains a count in contract and one in tort, not alleged to be for the same cause of action, and a demurrer to the declaration is sustained for misjoinder of counts, and the count in tort is stricken out, and, by amendment, a count in tort is added for the same cause of action, and this is properly averred, such amendment does not discharge the sureties on a bond given to dissolve an attachment in the action, although the amendment is made without notice to the sureties.

CONTRACT upon a bond to dissolve an attachment. Trial in the Superior Court, without a jury, before *Pitman*, J., who reported the case for the determination of this court, in substance as follows :

The declaration in the original action in which said attachment was made, containing three counts, was as follows :

"And now comes the plaintiff, who is a minor and sues by his next friend, S. H. Dudley, and says that, on or about the twelfth day of November last, he formed a copartnership with one George E. Sewell, for the purpose of carrying on the drug business in the city of Boston; that together with said Sewell he purchased of the defendant the stock in trade and fixtures then contained in the store numbered 817 Washington Street, in Boston aforesaid, for the sum of \$4500, \$1700 to be paid in cash and the balance in notes of the firm secured by a mortgage of the stock and fixtures; and the plaintiff says he paid the defendant, in good faith, the sum of \$850 in cash, being one half of the cash payment of \$1700, and he supposed and was led to believe, both by said Sewell and by said defendant, that said Sewell had also paid said defendant his half of said \$1700; but the plaintiff says that said Sewell did not pay the defendant the other half of said \$1700, and the defendant did not require him to pay the same; that said defendant conspired with said Sewell to secure the plaintiff's money to the defendant's use, and did so secure it to the amount of \$850; that at or about the same time the defendant promised the plaintiff that, if at any time the firm needed help or time on the notes above mentioned, he, the defendant, would bestow it; but the plaintiff says the defendant utterly failed so to do, but assigned the mortgage and the notes secured thereby to another person, who at once proceeded to foreclose the mortgage and to oppress the plaintiff, although the defendant promised the plaintiff that the assignee would do by the plaintiff the same as the defendant would do; and the plaintiff says he has given up to the defendant any and all rights ever acquired by him from the defendant, and demanded a return of the money paid by the plaintiff to the defendant, but that the defendant wholly refused to return the same; and the plaintiff says the defendant owes him the sum of \$850.

"And the plaintiff further says, that after the twelfth day of November last he paid or caused to be paid to the defendant the sum of \$200, in pursuance of the agreement made on that day, and that afterwards he gave up to the defendant all rights he ever acquired from him as mentioned in the first count, and demanded from him said \$200, together with the \$850 in the

first count mentioned; but the plaintiff says the defendant utterly refused and still refuses to return the same; and the plaintiff says the defendant owes him said sum of \$200 in addition to the \$850 in the first count mentioned.

“And the plaintiff further says the defendant owes him the sum of \$1050, money had and received to plaintiff's use, being the same money mentioned in the first and second counts.”

A demurrer to the first two counts in said declaration was sustained, and thereafter the plaintiff, without notice to or consent of the sureties on said bond, filed, by leave of court, an amendment to his declaration, containing two counts, as follows:

“And now comes the plaintiff, and amends the first count in said declaration as follows, to wit: He says that he is a minor, and sues by his next friend, S. H. Dudley; that on or about the twelfth day of November, A. D. 1872, he formed a copartnership with one George E. Sewell, for the purpose of carrying on the drug business in the city of Boston; that, together with said Sewell, he purchased of the defendant the stock in trade and fixtures then contained in the store numbered 817 Washington Street, in Boston aforesaid, for the sum of \$4500, \$1700 to be paid down in cash, and the balance in the notes of the firm secured by a mortgage of the stock and fixtures; and the plaintiff says that he paid the defendant, in good faith, the sum of \$850 in cash, it being his half of the \$1700 to be paid down in cash; but that said Sewell did not pay his half of said \$1700 to the defendant, and the defendant did not require him to pay the same; that in consideration of the premises, and of the cash paid by the plaintiff, the defendant promised the plaintiff that, if at any time the firm needed time or help on the notes above mentioned, the defendant would bestow it; but the plaintiff says the defendant utterly failed to do so, although requested, and assigned the mortgage and the notes secured thereby to another person, who at once proceeded to foreclose the mortgage and oppress the plaintiff, although the defendant promised the plaintiff that the assignee would do by the plaintiff the same as the defendant would do; and the plaintiff says he repudiated all contracts with said Sewell and with the defendant, and gave up to the defendant all rights ever acquired by the plaintiff

from said defendant, and demanded back from him the money paid him as aforesaid; but the defendant wholly refused to receive or accept any property or rights acquired by the plaintiff from him, or to pay back the money aforesaid, and the plaintiff says the defendant owes him the sum of \$850.

"And the plaintiff, further amending his said declaration, says that on or about the twelfth day of November, A. D. 1872, one George E. Sewell solicited the plaintiff to form a copartnership with him on equal shares, for the pretended purpose of carrying on the drug business in the city of Boston; that the plaintiff did in good faith enter into a copartnership with said Sewell, as he supposed; that the plaintiff was thereupon induced by the defendant and said Sewell to join with said Sewell, his pretended copartner, in the purchase from the defendant of the stock in trade and the fixtures contained in the store numbered 817 Washington Street, in Boston aforesaid, for the sum of \$4500, \$1700 thereof to be paid down in cash to the defendant, and the remainder thereof in the notes of the firm, secured by mortgage on the stock and fixtures; and the plaintiff says that the defendant and said Sewell falsely and fraudulently represented to the plaintiff that said Sewell had paid his half of said cash payment of \$1700, to wit, the sum of \$850; and he says that the defendant and said Sewell conspired together to induce the plaintiff to pay the defendant the sum of \$850 in cash, it being the plaintiff's half of said sum of \$1700, and that, relying upon the false and fraudulent representations of the defendant and said Sewell, and supposing and believing the same to be true, he did pay to the defendant, in cash, the sum of \$850, it being his half of said pretended cash payment of \$1700; and that, relying upon the said false and fraudulent representations of the defendant and of said Sewell, and supposing and believing the same to be true, he, the plaintiff, paid or caused to be paid to the defendant the further sum of \$200; and the plaintiff says that this count in tort is for the same cause of action as the first and second counts, and the third count, in said declaration, it being doubtful to which class said action belongs."

A demurrer to said declaration, as amended, was filed and sustained as to the first count contained in said amendment.

A trial was had, and a verdict rendered for the plaintiff upon said two remaining counts, namely, the third count in the original declaration and the latter count in said amendment.

Judgment was entered upon said verdict on May 13, 1885, which judgment remains unsatisfied.

The defendants contended that the effect of said amendment to the declaration in the original action was to release them from liability upon said bond. But the judge ruled otherwise; and found for the plaintiff in the penal sum of the bond.

If, upon the foregoing facts, the defendants, or either of them, were injured by error of law in said rulings, the finding as to them was to be set aside, and judgment was to be entered for the defendants, or such of them as were released from liability on said bond by said amendment, if such was the effect of the amendment; otherwise, judgment was to be entered upon the finding.

*J. B. Goodrich & G. W. Morse*, for the defendants.

*S. H. Dudley*, for the plaintiff.

C. ALLEN, J. The decision of the present case involves a further consideration of the pleadings in the much litigated action of the plaintiff against the principal in the bond now in suit, which has been four times before this court. *Kellogg v. Kimball*, 122 Mass. 163; 135 Mass. 125; 138 Mass. 441; 139 Mass. 296. It is now contended that the sureties on the bond given to dissolve the attachment in the original action were discharged by the allowance of the amendment to the declaration, adding a new count in place of the first and second counts in the original declaration. To have this effect, the amendment must be such as to let in some new demand or new cause of action, and not merely to vary the mode of stating the liability upon the same cause of action. *Wood v. Denny*, 7 Gray, 540. *Smith v. Palmer*, 6 Cush. 513. *Cutter v. Richardson*, 125 Mass. 72. The Pub. Sts. c. 167, § 85, provide that "the cause of action shall be deemed to be the same for which the action was brought, when it is made to appear to the court that it is the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed." The allowance of the amendment is conclusive evidence of the identity of the cause of action, as between the original parties; but

not as to third persons who have no notice of the application for leave to amend. The same cause of action may be set forth in a count in contract and a count in tort. Pub. Sts. c. 167, § 2, cl. 5. *Mann v. Brewer*, 7 Allen, 202.

In the present case, it is stated on the face of the amended count, that it "is for the same cause of action as the first and second counts, and the third count, in said declaration, it being doubtful to which class said action belongs." The allowance of the amendment shows that the judge who allowed it understood it to be for the same cause of action. The trial proceeded upon the same assumption, the case having been submitted to the jury, and a verdict having been taken upon the original third count and the amended count, as representing one cause of action. The defendants do not now contend, and we do not see, that the amended count was for a different cause of action from that set forth in the original third count; but they place their defence on the ground that the original declaration was insufficient, because it contained counts in contract and in tort, not averred to be for the same cause, which, therefore, could not legally be joined. There is no suggestion that the amended count introduced any new demand, or that it was anything else than a different mode of stating the original claim. The demurrer to the first two counts of the original declaration was sustained on the ground that they were improperly joined with the third count, merely because, as we understand from the defendant's brief, there was no sufficient averment of identity in the cause of action. This defect was cured by inserting such an averment in the new count, and this does not have the effect to discharge the sureties. It is merely supplying a formal defect. This is the only question which we have to consider.

*Judgment affirmed.*



GEORGE S. JONES *vs.* STEPHEN DOW & another.

Suffolk. March 5. — June 30, 1886. W. ALLEN & HOLMES, JJ., absent.

A negotiable promissory note of a corporation, signed in its name by P., treasurer, and payable to the order of P., was indorsed by the payee for the accommodation of the maker. On the back of the note was the following, signed by the defendants: "We hereby guarantee the payment of the within note." *Held*, that the defendants' contract was not with the payee, but with the first holder for value. *Held, also*, that the guaranty was not within the statute of frauds.

The declaration in an action alleged that a corporation, by its treasurer, P., made a promissory note for \$5000, payable to P., for the purpose of negotiating it for the benefit of the corporation; that P. indorsed the note, which was approved by the directors of the corporation; that the defendants, who were directors, "for said purposes and for said considerations," indorsed upon the note the following contract: "We hereby guarantee the payment of the within note;" and that the note was then, before its maturity, sold and delivered to the plaintiff for a valuable consideration paid by him to P. At the trial, the plaintiff testified that P. asked him to discount the note; that he had the transaction with him as treasurer; that P. said the money was going to the corporation; that he let P. have \$1000, and took his individual note for the amount, with the note for \$5000 and a bill of sale of a lot of railroad ties as collateral security, with a power of sale on default of payment within five days; that he afterwards made two similar loans of \$250 each, taking P.'s individual note for each with the same security; that these loans were not paid when due; and that payment was demanded. *Held*, that sufficient consideration had been shown to support the action on the guaranty; that there was no variance between the declaration and the proof; and that the testimony of the plaintiff was admissible for the purpose of identifying the plaintiff as the first holder for value and the promisee in the guaranty, and also to show the consideration.

CONTRACT, against the Boston and Mystic Valley Railroad Company, Sydney P. Pratt, P. W. Locke, Stephen Dow, Nathan P. Pratt, and J. P. Thompson. The declaration alleged that the Boston and Mystic Valley Railroad Company, by its treasurer, Sydney P. Pratt, made a promissory note for \$5000, dated October 15, 1878, payable four months after date, with interest, to the order of Pratt, for the purpose of being sold in the market in order to raise money to meet the liabilities of said company, which note was at the same time approved by the directors, (a part of whom were defendants in this action,) as appeared by a writing on the note; that, at the same time, the note was indorsed by Pratt, waiving demand, notice, and protest; that, at the same time, for said purposes, and for said considerations, the other defendants, who were directors, and who approved the

note and transactions, made and entered into the following contract, which they then and there indorsed upon the note: "We hereby guarantee the payment of the within note, waiving demand, notice, and protest;" that the note, being in said condition, was sold and delivered to the plaintiff for a valuable consideration, paid by him to Pratt as treasurer of said company; that the plaintiff received the note, before the same became due and payable, soon after the making and approval of the note and the indorsement thereof, and said contract by the defendants, which were all parts of one and the same transaction, done for one and the same purpose, to wit, to raise money for the purposes of said railroad company, by means whereof the other defendants became liable and promised to pay said note at its maturity to the lawful holder thereof, which lawful holder was the plaintiff; and that the note was not paid by said company, or by Pratt, at the date of its maturity, nor ever since, nor have the other defendants, or either of them, or any other person, paid said note, but have totally neglected and refused so to do.

Answer: 1. A general denial. 2. That the note was materially changed after its execution and guaranty, without the knowledge or consent of the defendants. 3. The statute of frauds. 4. A denial of the genuineness of the defendants' signatures, and a demand for proof of the same.

After the former decision overruling a demurrer to the declaration, reported 137 Mass. 119, the case was tried in the Superior Court, before *Gardner, J.*, who allowed a bill of exceptions, in substance as follows:

The trial proceeded against Dow and Thompson only.

The plaintiff testified, that about December 1, 1878, he met a broker, who took him to the office of the railroad company, and he there saw S. P. Pratt and P. W. Locke; that they showed him a promissory note for \$5000, and asked him if he could discount one of these notes, or get one discounted; that there would be six notes of \$5000 each; that George P. Baldwin had one; that they wished others discounted, and wanted him to do so; that they gave him names to look the notes up; that he saw Baldwin, who showed him his note, and said the parties were responsible; that he met S. P. Pratt in the office of one

Butterworth, the plaintiff's counsel, on December 13, 1878, and received the note in suit; that he lent at that time \$1000, and took the note, a copy of which is printed in the margin,\* and received, as collateral security, the note in suit, and a bill of sale of ties, a copy of which is printed in the margin;† that about January 4, 1879, he made another loan of \$250, and took a promissory note of that date (a copy of which was annexed to the exceptions, and was in form similar to the \$1000 note); and that a third loan of \$250 was made before or after the loan of January 4, and a note similar to the note of that date taken, which was mislaid or lost.

The plaintiff was asked by his counsel to state all that was said and done at the interview between him and Pratt, when the plaintiff purchased the note in suit, to which the defendants objected; but the judge allowed the question to be answered, and the plaintiff thereupon testified as follows: "Sydney P. Pratt took a writing from me, of which I kept no copy. I made this loan on the note, and gave him a writing in relation to the transaction. As near as I can recollect, I made the transaction with Sydney P. Pratt, as treasurer of the company, and had the note from him as treasurer of the company. He said he had a note, — a Mystic Valley note, — which he wished to have

\* "\$1000.

Boston, December 13th, 1878.

"Five days after demand and payable five days after notice, with interest at the rate of two per cent per month, I promise to pay to George S. Jones, Esq., or order, one thousand dollars, for value received. I having deposited with this obligation, as collateral security, note of the Boston and Mystic Valley R. R. Co. for \$5000, dated October 15th, 1878, payable four months after date, and a certain lot of railroad sleepers, comprising all the sleepers belonging to me on Mystic Wharf, in Somerville, consisting of not less than six thousand sleepers, with authority to sell the same without notice, either at public or private sale or otherwise, at the option of the holder or holders hereof, on the non-performance of this promise, he or they giving me credit for any balance of the net proceeds of such sale remaining, after paying all sums due from me to the said holder, or holders, or to his or their order.

"Sydney P. Pratt."

†

"Boston, Mass., Dec. 15th, 1878.

"For and in consideration of \$1000, to me paid by George S. Jones of Boston, I hereby sell and convey unto him all and singular whatever sleepers and railroad ties belonging to me on the Mystic Wharf in Somerville, being not less than six thousand.

"S. P. Pratt."

me discount. I asked to see it. He showed me the note. I looked it over and asked him if it was all right. He said it was, and that he was treasurer of the company, and that the money was going to the company. He told me he was treasurer of the company; and that this transaction was to raise money on behalf of the company. There was a verbal agreement that I should give him ten days' notice if I wanted the money, and, if he paid me the money, he was to give me ten days' notice, so that I might have a chance to loan it again; and if it was not forthcoming after I gave him the ten days' notice, I should come into full possession, and everything was to be mine, if he did not so carry out his agreement; and I notified him, and he did not pay it."

On cross-examination, the plaintiff testified that he did not know whether the note he saw at the time he first met Pratt and Locke was the one now in suit; that he made no inquiry about the authority under which the note purported to be issued; that Baldwin showed him two notes, dated October 5 and October 15; that he made many inquiries, and was told there were six notes issued, and he found that true; that he paid \$1000 on December 13, in checks payable to Sydney P. Pratt; that he could not say how he paid the money for the other two notes; that he saw Locke after the protest, and showed him the note; that he said nothing about its not being genuine, but did at some time speak about the date being changed; that he said he was counsel for Dow, and could collect the note for the plaintiff; that the plaintiff met H. C. Hall in Butterworth's office; that there was talk that no notes were issued except on the 15th; that Hall wanted to know if the plaintiff's was dated the 15th, as, if so, it could not be genuine; and that the plaintiff expected an offer for the note, but they only offered to put him in possession of the sleepers by helping him in a suit he was to bring.

The plaintiff offered in evidence the writing declared upon, to which the defendants objected, on the following grounds: 1. That the guaranty was an agreement to pay the debt of another, within the meaning of the statute of frauds. 2. That the name of the plaintiff did not appear in the writing, and no written evidence was offered that it was intended for the plaintiff. 3. That no consideration had been shown to support

an action by the plaintiff against the defendants. 4. That the evidence discloses a transaction between Pratt personally and the plaintiff, both parties treating the writing as Pratt's own property, and that the guaranty was not negotiable. These objections were severally overruled.

It appeared on behalf of the defendants, that, in 1878, they were directors of the Boston and Mystic Valley Railroad Company, of which Dow was president, and that S. W. Twombly, Nathan P. Pratt, and P. Webster Locke were the remaining directors; that on October 3, 1878, the directors voted "that the treasurer be and hereby is authorized and directed to borrow a sum of money not to exceed thirty thousand dollars, and to give the notes of the company therefor in such sums, and on such time not less than three months, and at such rates of interest not in excess of eight per centum per annum, as shall be necessary to enable him to obtain the funds. But no note shall be issued by him that is not approved by at least three of the directors of the said Boston and Mystic Valley Railroad Company;" that, on October 5, all the directors and the treasurer, S. P. Pratt, met at the office of the company, and upon Pratt's promises, hereinafter set forth, six promissory notes of \$5000 each, each dated October 5, 1878, and payable four months after date, to the order of Sydney P. Pratt, with interest at the rate of five per cent per annum, were drawn and signed by the company, approved by Twombly, Thompson, and Locke as three of the directors, indorsed by Sydney P. Pratt, and the following writing was upon the back of each note, signed by Dow, Nathan P. Pratt, Thompson, and Locke: "We hereby guarantee payment of the within note, waiving demand, notice, and protest;" and that these notes and guaranties were delivered to S. P. Pratt.

At the trial, Dow produced three notes, G. Morse, as administrator of the estate of George P. Baldwin, two notes, and E. L. Chaffee, as treasurer of the Boston Loan Company, one note, which six notes, the dates of four of which had been changed to October 15, were identified by Dow, Thompson, Twombly, and Locke as the notes signed October 5, were admitted by the plaintiff to be genuine, and were used by both parties as standards of handwriting for comparison.

Dow, Thompson, Twombly, and Locke each testified that these six notes were the only notes issued on October 5, or in pursuance of the vote of October 3; that no other notes were ever signed by either of them as approving directors, and no other notes were guaranteed by them, or either of them; and that no other notes were ever issued by the company, except one payable to Stephen Dow and one payable to Nathan P. Pratt; and each testified that his name upon the note in suit, wherever it appeared, was not his signature, and not written by him or with his knowledge; that he never saw the note in suit until it was annexed to interrogatories to the defendants about three weeks before the trial; that the note in suit was never issued by the company, or authorized to be issued; and that the company never received any money from the note in suit, to his knowledge.

Dow, Thompson, and Twombly each testified that they never assented to any change of the date of any of the notes from October 5, and never knew that the date of either of them had been changed until long after; and Locke testified that he knew that the date of some of them had been changed, and personally consented to the change, but had no knowledge that either of the other directors consented.

Solon Bancroft, called by the defendants, testified that he was a receiver of the Reading Savings Bank, and had become acquainted with the signature of Nathan P. Pratt, and that the name Nathan P. Pratt upon the note in suit was not the signature of said Pratt; and on cross-examination he testified that Sydney P. Pratt was clerk in the Reading Savings Bank, of which his father Nathan was treasurer, and that a large number of signatures and writings had been forged, in connection with the transactions of the bank, and among the forgeries was the name of Nathan P. Pratt; and that shortly after the discovery of these forgeries Sydney P. Pratt ran away, and had not been heard of since.

J. P. Thompson, one of the defendants, further testified, that, before the notes were made, S. P. Pratt urged them to guarantee the notes, and stated that he had a party who was ready to take them, and furnish the money at once; that with this money they could so far complete the road that the mortgage bonds

could be placed; that bonds would be taken in payment for the notes when they became due, and that he would see that they should never be called upon to pay anything upon them; that upon these promises he signed the guaranty; and that he did not know the plaintiff, and had never had any conversation with him, and did not know he held a note, or alleged note, until receiving notice of protest.

E. L. Chaffee, called by the defendants, produced a note for \$5000, dated October 15, 1878, which was put in evidence as one of the six notes executed on October 5, having genuine signatures but an altered date; and, on cross-examination, he testified that he was the treasurer of the Boston Loan Company; that about October 15 he lent Sydney P. Pratt \$5000, and received as collateral security three notes of \$5000 each, of which that produced was one; that, soon after, Pratt paid him \$4000, and he returned him the other two notes; and that he could not identify the notes he returned, but they were similar to the one produced.

S. W. Twombly further testified, that he was occupied principally in settling land damages in connection with the road, and knew nothing about the books; that S. P. Pratt had talked with him and the directors generally about guaranteeing the notes; that Pratt said he wanted to raise \$30,000, and with that he could complete the road, and the only way he could get that amount was on six notes, on which he was promised the money by a banker near by, whom he named, and, if we would guarantee the notes, we should never see or hear from them; that he said, "You will never hear from the notes; I have got a man to take them, and I will have the money to-morrow, or in a day or two;" that, with that understanding, the notes were made; that, at the time of signing, he noticed the dates particularly, and they were each October 5, and he never signed any other note, and had no knowledge of any other notes; and that this loan did not relieve the company from indebtedness, because they did not get it.

P. W. Locke further testified, that there was no such interview as the plaintiff described about December 1, 1878, at which he was present; that he did not know of any negotiations with the plaintiff to take one of the notes, and did not

know of the transaction in Butterworth's office until long after; that the plaintiff never showed him the note, and he never told the plaintiff that he was counsel for Dow and could collect it; that the plaintiff did at one time cover the body of the note, and, showing him the signature, ask if that was not his signature; that he first learned that the plaintiff held a note as collateral for \$1500 he had lent Pratt, but never regarded it as binding upon the guarantors, and had always believed it to be one of the six notes of October 5; that when those notes were signed, S. P. Pratt told the directors that \$30,000 would so far complete the road that the mortgage bonds could be placed without difficulty; that we could have the money, and he then had a party ready to advance the money, and, if we would give him the guaranty, he would protect it, and the guarantors should never hear from it; that he, Locke, was counsel for the road, and this guaranty was drawn to run to Pratt, and upon his promises to furnish the money; and that he told the plaintiff, that, if he had a note dated October 15, it was a changed note, as no note of that date was ever issued.

Stephen Dow further testified, that he several times refused to sign any note to go out upon the street; that, before these guaranties were signed, Pratt said he had a man who was going to take the notes and keep them in his possession, and we should never be called upon, and, when the time came, they would be paid and taken up; that he repeatedly asked Pratt to return the notes after he failed to get the money, and he always said they should come back; that two of the notes he produced he got from one Sheldon; that he paid \$5000 for one, and the note with the changed date was surrendered with the other, and the third note he paid \$3000 for, in ignorance that the date was changed; that after October 5, until the trial, he had never seen the notes held by the Boston Loan Company and the Baldwin estate, and never saw the plaintiff's note until the time stated previously; that he knew there was a forged note in existence, but did not know which it was until he saw this one; and that he never saw the plaintiff until after this action was commenced, and then saw him one Sunday at his hotel in Lynn, while out riding; and that he afterwards met him at the office of one Brooks.



H. C. Hall, called by the defendants, testified that he became treasurer of the company in 1879, after S. P. Pratt had absconded; that he endeavored to find out what was the financial standing of the company; that in his efforts to do so he interviewed each of the directors, and was told by each of them that only six notes had been issued by the company, each dated October 5, and that they never signed or guaranteed any notes of the company except those six notes; that he found seven alleged notes in existence, all of which he saw, except the one held by the plaintiff, and one dated October 15, in the possession of Baldwin; that Locke told him the plaintiff held a note which he had taken as collateral, with other things, for about \$1500 lent Pratt; that as treasurer, and while negotiating a sale of the road, he made a schedule of all the possible liabilities of the company, and included the plaintiff with a possible claim of \$1500; that he could not find from the books of the company, or from any other source, that the company had received or used any money after November, 1878; that the books of the company kept by Pratt were manifestly incorrect, and wholly failed to show the actual transactions of the company; that he had several interviews with the plaintiff, and told him that one of the notes out was a forgery, and asked to see the note, that he might satisfy himself as to its genuineness; that the plaintiff always refused to show him the note; and that he never saw it until about three weeks before the trial, and then pronounced it a forgery.

The plaintiff, being recalled, produced three checks given by him to Pratt as part of the \$1000, each payable to Sydney P. Pratt, and dated December 13, 1878, for the sums respectively of \$601, \$150, and \$99.

F. S. Nickerson testified for the plaintiff, that, in December, 1878, he held for collection a claim of a person against the company for work done upon the road; and that about December 13 he received from S. P. Pratt in settlement of that claim the above-mentioned check for \$99.

In rebuttal of the testimony of F. S. Nickerson, Hall testified that the person for whom Nickerson said he received the money from Pratt never worked for or was under contract with the road, and that the company could not have owed him anything;

that this person worked for sub-contractors under Hall, who was himself a contractor; and that these sub-contractors had been paid in full by himself.

George T. Sheldon, called by the plaintiff, testified that he received from Sydney P. Pratt two of the six notes which had been produced as made by the company, on October 5, 1878; and that they were delivered to Hall or Dow after protest, upon payment to him of \$5000.

There was evidence on the part of the plaintiff, from several persons who had seen the defendants Dow and Thompson write, and from experts in handwriting, tending to show that the signatures of Dow and Thompson were genuine, as well as similar evidence from other persons and experts to the contrary. There was no evidence in the case of more than six notes being issued by the company in accordance with the vote of October 3, nor of more than six notes being approved, nor of more than six notes being guaranteed by the defendants, except as the testimony is herein reported.

The defendants asked the judge to rule that there was no evidence of any consideration for a guaranty by the defendants to the plaintiff; that there was no evidence that the plaintiff was the first holder for value of the note in suit; that there was no evidence of a contract between the plaintiff and the defendants; and that there was a fatal variance between the evidence and the declaration. The judge refused to give these rulings.

The jury returned a verdict for the plaintiff; and found specially, in answer to questions submitted to them by the judge, that the names of Dow and Thompson, as guarantors upon the note, were not forged. The defendants alleged exceptions.

*W. C. Cogswell*, (*O. T. Gray* with him,) for the defendants.

*S. H. Phillips*, for the plaintiff.

MORTON, C. J. Most of the questions presented by the bill of exceptions have been previously decided by this court.

The case of *Baldwin v. Dow*, 130 Mass. 416, was an action upon a promissory note and guaranty, which was one of the same series of notes with the note in suit, in the same form, and issued under like circumstances. It was there held that the contract of the defendants was not with the payee of the note, but with the first holder for value who took the note with the guaranty

upon it; and that the contract was to be interpreted as if, when the plaintiff paid the money to the corporation, all the parties were present, and then signed and delivered the note and guaranty in the present form. When the case at bar was before us upon demurrer, the same principle of interpretation was reaffirmed, and it was held that the declaration sufficiently set out a guaranty of the note for a sufficient consideration to the plaintiff, as the first holder for value. *Jones v. Dow*, 137 Mass. 119.

At the trial in the Superior Court, the evidence tended to show the consideration alleged in the declaration, and was sufficient to justify the jury in finding that the promise of the defendants was to the plaintiff.

The defendant contends that the guaranty is insufficient to satisfy the statute of frauds, because it does not contain the name of the plaintiff as the promisee.

It is true that, in order to satisfy the statute of frauds, it is necessary that the memorandum should show who are the parties to the contract, but it is sufficient if this appears by description instead of by name; and if the promisor or promisee is described, instead of named, parol evidence is admissible to apply the description, and identify the person who is meant by it. *Benjamin on Sales* (4th Am. ed.) § 237, and cases cited. *Gowen v. Klous*, 101 Mass. 449.

The evidence of the circumstances under which the plaintiff took the note in suit, objected to by the defendants, was competent to identify the plaintiff as the first holder for value and the promisee in the guaranty, and also to show the consideration. *Baldwin v. Dow*, *ubi supra*.

The evidence in this case justified the jury in finding that the plaintiff was the first holder for value, and that there was a valid promise made to him by the defendants. We are of opinion that none of the defendants' exceptions can be sustained.

*Exceptions overruled.*

## JOHN G. SHEERBURNE vs. LUTHER E. SHEPARD.

Middlesex. March 8, 9. — June 30, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

It is no defence to a *scire facias* against the indorser of the writ in an action, that the plaintiff, in taxing his costs in that action, in which he was the defendant, fraudulently procured the allowance by the clerk of various sums to which he was not lawfully entitled.

MORTON, C. J. This is *scire facias* against the indorser of a writ. The only defence now relied upon is, that the plaintiff in this suit, in taxing his costs in the original action, in which he was the defendant, fraudulently procured the allowance by the clerk of various sums to which he was not lawfully entitled. We are of opinion that this defence is not open to the defendant, but that the judgment in the original action, so long as it is unreversed, is conclusive upon him.

The statute provides that "every indorser, in case of avoidance or inability of the plaintiff, shall be liable to pay all costs awarded against the plaintiff." Pub. Sts. c. 161, § 24. The liability of an indorser is analogous to that of bail, the indorser being a surety for the plaintiff, as bail is for the defendant. Either is so far a privy to the judgment as to be bound by it, unless it is obtained by collusion between the parties to it, in order to create or enlarge the liability of the indorser or bail.

The grounds of defence set up in this suit might and should have been tried in the original suit. The objection now made to the taxation of the costs could have been raised in that suit before the clerk, and, by appeal, before the court, by the plaintiff therein, and by the indorser, who is a party to the record, and so far interested in and privy to the suit that he would have had a right to be heard upon the taxation of costs. As neither raised the questions at the proper time, the judgment duly rendered is conclusive upon both, and the defendant in this suit cannot collaterally impeach it. *Webster v. Lowell*, 2 Allen, 123. *Tracy v. Maloney*, 105 Mass. 90. *Tracy v. Goodwin*, 5 Allen, 409. *Springfield Card Manuf. Co. v. West*, 1 Cush. 388. *Wood v. Mann*, 125 Mass. 319.

The question is not whether the indorser could impeach the judgment by proof that the parties thereto obtained it by collusion in order to charge him. No such collusion was alleged, or offered to be proved. *Exceptions overruled.*

*C. Cowley*, for the defendant.

*C. H. Conant*, for the plaintiff.

**ELIOT FIVE CENTS SAVINGS BANK *vs.* COMMERCIAL UNION  
ASSURANCE COMPANY.**

Suffolk. March 10. — June 30, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

A policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 139, against loss by fire upon certain premises, was issued to A., payable in case of loss to B., mortgagee, and providing that the insurer, within sixty days after statement or proof of loss, should either pay the amount of its liability or replace the property. After the policy was issued, A. conveyed the premises to C. A loss occurred, and within a month afterwards B. delivered to the insurer a proof of loss, signed and sworn to by C.; and, more than sixty days before bringing suit, B. delivered to the insurer another proof of loss, signed and sworn to by A. The insurer received and retained both of these proofs without objection, and, though twice asked in writing to inform B. if it required or wished for any further statement, made no reply. *Held*, in an action upon the policy, that the insurer had waived any defects in the proofs of loss, if any existed.

If a policy of insurance is issued to "A., payable in case of loss to B., mortgagee," and is in the form prescribed by the Pub. Sts. c. 119, § 139, containing the provision that, "if this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee, or his agents or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate," a conveyance of the insured property by A. to C., without the assent of the insurer, although it may avoid the policy as to them, will not affect B.'s right to recover, after a loss.

A policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 139, against loss by fire upon certain premises, was issued to "A., payable in case of loss to B., mortgagee," and providing that the insurer, within sixty days after proof of loss, should either pay the amount of its liability or replace the property, or might, within fifteen days after such statement, notify the insured of its intention to rebuild or repair the premises. A loss occurred, and, nine days afterwards, and after an agent of the insurer had examined the premises and appraised the loss, B., at the request of A., who was unable to do so, began to repair the premises. Immediate repairs were necessary in order to prevent further damage. The repairs were duly finished, and were reasonable and proper for the protection of the property. The insurer never notified the insured of an intention to

repair. *Held*, in an action by B. upon the policy, that his acts in making repairs did not defeat his right to recover.

A policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 189, against loss by fire upon certain premises, issued to "A., payable in case of loss to B., mortgagee," provided that the insurer might elect, when it was not liable to the mortgagor or owner, either to pay to the mortgagee the loss, or to pay the full amount secured by the mortgage, and to receive an assignment of the mortgage and debt. A loss occurred, and B., at the request of A., who was unable to do so, made repairs upon the premises which were necessary for the protection of the property. The insurer denied its liability for the loss; and B. brought an action upon the policy. The insurer filed an answer, denying any liability on its part; and, seven months after the action was brought, made a tender to B. of the amount of the mortgage, principal and interest, and requested an assignment of the mortgage and note, which B. declined to make. *Held*, that the tender was not made within a reasonable time, and was not sufficient in amount.

MORTON, C. J. By the policy in suit, the defendant insured "George B. Taylor, payable in case of loss to Eliot Five Cents Savings Bank, mortgagees, as interest may appear," on a building in Boston called the Hotel Clifton, in the sum of \$5000, for five years from July 1, 1881. The policy is in the standard form prescribed by the Pub. Sts. c. 119, § 189, and the St. of 1881, c. 166, § 1, and contains the provision that, "if this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee, or his agents or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate: provided that the mortgagee shall on demand pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to the mortgagee for any sum for loss under this policy for which no liability exists as to the mortgagor or owner, and this company shall elect by itself or with others to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured." The policy also contains the provision that, in case of any loss or damage, the company, within sixty days after the statement or proof of loss, "shall either pay the amount for which it shall be liable, or replace the property with other of the same kind and goodness, or it may, within fifteen days after such statement, notify the insured of its intention to rebuild or repair the

premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition."

The building insured was damaged by fire on November 29, 1883, and, within a few days thereafter, an agent of the defendant and an agent of the plaintiff examined the premises, and appraised the amount of loss at \$4488, to recover which sum this action is brought, the writ being dated June 16, 1884. At the time the policy was issued, and at the time of the loss, the plaintiff held a mortgage upon the premises to secure the promissory note of the said George B. Taylor for \$12,500. On December 26, 1883, the plaintiff delivered to the defendant a proof of loss, signed and sworn to by Abby E. Taylor, to whom George B. Taylor had conveyed the premises since the policy was issued. And on March 22, 1884, more than sixty days before this suit was brought, the plaintiff delivered to the defendant another proof of loss, signed and sworn to by the assured, George B. Taylor. The defendant received and retained both of these proofs without objection, and, though twice asked in writing to inform the plaintiff if it required or wished for any further statement, remained silent and made no reply. It must be held to have waived any defects in the proof of loss, if any existed.

If we assume, as contended by the defendant, that the conveyance by George B. Taylor to Abby E. Taylor, without the assent of the company, avoided the policy as to them, yet, under the first clause above cited, it would not affect the right of a mortgagee to recover.

But the defendant relies upon two grounds of defence. One is, that the plaintiff, by its acts in entering upon and repairing the premises immediately after the fire, deprived the defendant of its right to elect to rebuild or repair the premises within fifteen days after the proof of loss.

It appears that, nine days after the fire, and after the agent of the defendant had examined the premises and appraised the loss, the plaintiff began to repair the premises. Immediate repairs were necessary in order to prevent further damage. The repairs were finished on March 28, 1884, and, it is admitted, were reasonable and proper for the protection of the property.

The policy provides, that the company shall pay the loss within sixty days after the proof of loss, or it may, within fifteen days after the proof of loss, notify the insured of its intention to rebuild or repair the premises.

The fact that the plaintiff had commenced making repairs without notice, did not deprive the defendant of its right to notify the plaintiff of its intention to repair the premises. If the defendant had done so, and found that the insured was making repairs without any notice to it, both acting in good faith, it might be difficult to adjust fairly the rights of the parties. But there is nothing to show that the defendant ever entertained the intention to repair. It has never notified the insured of such intention, and it is clear that the acts of the plaintiff in making necessary repairs, in good faith, ought not, upon any principles of law or justice, to defeat the right to recover its actual loss.

The other ground of defence is, that the defendant tendered to the plaintiff the amount secured by its mortgage, and demanded a transfer of the mortgage and note, which demand the plaintiff refused. The facts agreed are, that, "on January 20, 1885, the defendant made a legal tender to the plaintiff of the amount of the principal of the mortgage (\$12,500), and accrued interest thereon due upon said day, and requested the plaintiff to assign, transfer, and deliver to the defendant the mortgage and note, which the plaintiff declined to do."

We think there are two answers to this defence. The statute and the policy give the company the right, in a case where it is not liable to the mortgagor or owner, to elect either to pay the mortgagee the loss, or to pay the full amount secured by the mortgage, and to receive an assignment of the mortgage and debt; but the law implies a condition that this right of election shall be exercised within a reasonable time. In the case before us, the defendant denied its liability to pay the loss, compelled the plaintiff to bring this suit, filed an answer denying any liability on its part, and, seven months after the suit was brought, made the tender upon which it relies.

If this tender is sufficient, it must follow that any tender made before judgment in the suit would defeat the plaintiff's right to recover. The result would be to throw upon the plaintiff all



the costs and expenses of the suit, which would be unreasonable and unjust. We are of opinion that the tender made by the defendant was not made within a reasonable time, and was too late to be of avail as a defence to this suit.

We are also of opinion that the tender was not sufficient in amount. The defendant was required to tender "the full amount secured by such mortgage" at the time the tender was made. The plaintiff had, before the tender, made large expenditures, necessary to protect the property, and to prevent further damage to it. The fire rendered the plaintiff's security insufficient to cover its debt. The mortgagor and the owner of the equity were unable to make repairs, and the plaintiff did so at their request. We cannot doubt that, under these circumstances, the mortgagor and his assigns would, in equity, be liable to pay whatever the mortgagee had reasonably spent to protect the property and to uphold his security, and that the full amount secured by the mortgage includes such expenditures.

For these reasons, we are of opinion that the plaintiff is entitled to recover the full amount of the loss. *Judgment affirmed.*

*J. L. Thorndike & H. G. Allen*, for the plaintiff.

*M. Williams & C. A. Williams*, for the defendant.

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COMMONWEALTH *vs.* BOSTON AND ALBANY RAILROAD  
COMPANY.

SAME *vs.* SAME.

Suffolk. March 22. — June 30, 1886. W. ALLEN & HOLMES, JJ., absent.  
DEVENS, J., did not sit.

Shares of stock in a corporation are not necessarily extinguished by being transferred to the corporation, so that they cannot be reissued.

Under the St. of 1882, c. 121, § 1, providing that the Treasurer of the Commonwealth shall assign to the corporation therein named all the shares of the capital stock of the corporation which are owned by the Commonwealth, or which belong to funds over which the Commonwealth has exclusive control, in exchange for certain bonds of the corporation, at a rate specified, and that thereupon the corporation "shall hold and dispose of the shares of stock so assigned to it as its absolute property," the corporation may divide such shares among its stockholders.

THE FIRST CASE was an information in equity, filed on November 13, 1885, by the Attorney General, in pursuance of the direction of the General Court,\* and alleging the following facts:

The defendant is a corporation under the laws of this Commonwealth, owning and operating a railroad therein, with the rights and privileges, and subject to the limitations and restrictions, of railroad corporations, as provided by the general laws and statutes of the Commonwealth, and especially by the St. of 1867, c. 270, § 17.†

On April 1, 1882, the corporation had an authorized and paid up capital of twenty million dollars, consisting of two hundred thousand shares of the par value of \$100 each, of which twenty-four thousand one hundred and fifteen were owned in part by the Commonwealth by absolute title, and in part belonged to various funds of which the Commonwealth had exclusive control, that is to say, the following funds: the war loan sinking fund, the bounty loan sinking fund, the Troy and Greenfield Railroad sinking fund, and the Massachusetts school fund.

On April 1, 1882, the Commonwealth, in accordance with the provisions of the St. of 1882, c. 121, assigned to the defendant corporation said twenty-four thousand one hundred and fifteen

\* The Res. of 1884, c. 61, directs the Attorney General "to institute appropriate legal proceedings, in the name of the Commonwealth, in the Supreme Judicial Court, against the Boston and Albany Railroad Company, and such other parties as may be necessary, to annul and render void the distribution among its stockholders of certain of the shares of the stock of said company, received from the Commonwealth under the provisions of" the St. of 1882, c. 121, "and to render void and of no effect the certificates of stock issued by said company whereby such distribution was effected, and such as shall be necessary to the due enforcement of the laws and protection of the rights of the Commonwealth and of the public."

The Res. of 1885, c. 72, authorizes the Attorney General, with the approval of the Governor and Council, to expend, if necessary, a sum not exceeding \$18,000, to carry out the provisions of the Res. of 1884, c. 61.

† This section is as follows: "The Commonwealth may at any time purchase of the Boston and Albany Railroad Company its road and all its franchise, property, rights, and privileges, by paying therefor such sum as will reimburse it the amount of capital paid in to the several corporations composing it, and to the Boston and Albany Railroad Company, with a net profit thereon of ten per cent a year, from the times of the payment thereof by the stockholders of said corporations, respectively, to the time of the purchase."

shares of the capital stock of the corporation at the rate of \$160 per share, and the corporation gave in exchange \$400 in money and \$3,858,000 in five per cent bonds of the corporation, payable in twenty years from said date, which bonds were issued under the provisions of said act for the purpose of purchasing said shares, and are still outstanding and owned by the Commonwealth; but the corporation has established no sinking fund to meet the principal or interest of said bonds, and has paid such interest out of the earnings of the corporation. The corporation held said stock until September 27, 1883, and declared no dividends thereon, but declared dividends upon all the stock held by private stockholders at the rate of eight dollars per share annually.

The Commonwealth has annually, however, since said transfer, included said stock in making up the value of the corporate franchise of the defendant for the purpose of taxation, has assessed the defendant thereon, and the defendant has paid the taxes in the same way and at the same rate as upon the remainder of its capital stock.

On September 27, 1883, the corporation, by its directors, voted to distribute among its private stockholders seventeen thousand five hundred and eighty-eight of the shares of the capital stock received from the Commonwealth; and on December 27 following, it voted to issue certificates of stock for fractional rights under said vote of September 27. The votes so passed were in substance as follows:

“Voted, that the treasurer be authorized to distribute to private stockholders of record at the close of business on the twenty-seventh day of September, 1883, one share for every ten shares held by the respective stockholders other than this corporation; and to issue to holders of less than ten shares assignable certificates for fractional rights, convertible into stock at the rate of one share for every ten rights, if presented at the treasurer's office on or before the twentieth day of December, 1883, in lots of ten or multiples of ten, the purpose of this vote being to distribute to the private stockholders seventeen thousand five hundred and eighty-eight shares out of the twenty-four thousand one hundred and fifteen shares of the capital stock which were purchased from the Commonwealth of Massachusetts.”

"Voted, that the treasurer may, with the consent of the finance committee, issue certificates of stock for fractional rights under the vote of September 27, 1883, distributing stock to the stockholders when presented in lots of ten or multiples of ten, and pay, after December 31, 1883, such dividends thereon as the holders would have been entitled to if the record title to such shares had been completed before November 30, 1883."

All of said seventeen thousand five hundred and eighty-eight shares have been distributed under said vote, and six or more dividends of \$2 per share have been declared and paid upon said shares from the earnings of the corporation. When the vote to distribute said shares was passed, the defendant had undivided surplus earnings as follows: on September 30, 1882, the end of its fiscal year, there was a profit and loss balance of \$2,632,921.58, and on September 30, 1883, this balance amounted to \$2,798,795.17. The stock so distributed by vote of September 27, 1883, at \$160 per share, the rate paid by the defendant corporation, amounted in value to \$2,814,080, and was charged at that amount on the books of the corporation against the profit and loss balance; but the market value of such stock as was sold on September 27, 1883, was \$167 per share. Beyond the \$2,798,795.17 mentioned above, the defendant corporation had, on September 27, 1883, no surplus earnings applicable to dividends, unless a certain fund, called the "improvement fund" on the books of the company, is considered as such. This fund was created as follows:

On October 16, 1879, surplus earnings to the amount of \$450,000 were set apart according to the following vote: that such earnings, "amounting in the aggregate to four hundred and fifty thousand dollars, be and the same are hereby set apart and constituted a fund to be known as and called an 'improvement fund,' to be subject to such disposition and uses as may from time to time be determined by this board;" on October 28, 1880, further surplus earnings to the amount of \$300,000 were added to the fund, according to the following vote: "October 28, 1880. Voted, that the sum of three hundred thousand dollars be added to the improvement fund, and that the same, with any accretions already or hereafter made to said fund, shall be subject to such disposition and uses as may from time to time be determined by this board."

These two sums, with accretions thereon, made up the amount of the improvement fund on September 30, 1883, to the sum of \$761,804.29; but there was no vote of the directors of the corporation authorizing the trustees to distribute such fund, or any part of it, to and among the stockholders of the corporation, or authorizing them to use such fund for the purpose of making good any distribution of stock or other assets, or to reincorporate such fund into the profit and loss balance.

The information further alleged that this stock so distributed neither was nor represented earnings of the corporation, but was obtained by incurring a funded indebtedness; and that the distribution of said stock was not authorized by the St. of 1882, was gratuitous and without consideration paid by the stockholders or any of them, and was illegal and in violation of the rights of the Commonwealth under the statutes thereof, and especially of its right under the St. of 1867, c. 270, § 17, to purchase of the corporation its road and all its franchise, property, rights, and privileges, by paying therefor a sum therein fixed, and under the Pub. Sts. c. 112, § 61.

The prayer of the information was that the certificates of stock of said seventeen thousand five hundred and eighty-eight shares, or so many of them as have been distributed, be declared void; that the corporation be restrained from paying any dividend on said stock so distributed, and commanded to call in said stock; and for other and further relief.

The defendant demurred to the information, and assigned as causes of demurrer the following: "1. None of the stockholders of the defendant corporation, among whom the bill alleges that the shares of stock were distributed which the plaintiff asks to have declared void, are made parties to the said bill. 2. The plaintiff has not stated in its bill such a case as entitles it to any relief in equity against the defendant. 3. The plaintiff has not stated in its bill such a case as entitles it to the relief prayed for."

THE SECOND CASE was a similar information, containing the same allegations as the first, and also alleging that the corporation, by its directors, intended to distribute the remaining six thousand five hundred and twenty-seven shares of the twenty-four thousand one hundred and fifteen shares received.

The prayer was that said corporation be restrained during the pendency of the suit from making any distribution of said six thousand five hundred and twenty-seven shares ; and for further relief.

The defendant demurred to this information, for want of equity.

Hearing before *Field, J.*, who reserved the cases for the consideration of the full court.

*H. N. Shepard*, Assistant Attorney General, (*E. J. Sherman*, Attorney General, with him,) for the Commonwealth. 1. It is conceded that there is no want of necessary parties defendant in the second case, since the information seeks to restrain the defendant from distributing shares as yet in its sole possession and control, and to which the shareholders have no legal or equitable right. Moreover; the shareholders are not necessary parties defendant in the first case, since no remedy is sought against them personally, but only the corporation is sought to be restrained from paying dividends upon said stock so distributed. No new or different questions can or will arise, if they be made parties, than are presented now, in the present action against the corporation only ; and, assuming that the shareholders should have been made parties defendant, it nevertheless is useful and proper to consider the real question of the case, because it is so far probable as almost to be certain, that, if the court shall decide the distribution of the shares to be illegal, the corporation will not insist upon the joining of its shareholders as parties to the bill before submitting to an adequate remedy. *Boston & Lowell Railroad v. Commonwealth*, 100 Mass. 399. *Cornell v. Mayor & Aldermen of New Bedford*, 138 Mass. 588.

2. Since the defendant has manifested its intention to distribute the shares as yet in its possession, it is proper for this court now to restrain it from so doing, and it is not obliged to wait until the evil is done before interfering. *Attorney General v. Boston*, 123 Mass. 460.

3. The gratuitous distribution by the defendant among its shareholders of the shares obtained from the Commonwealth is a stock dividend, and, as such, prohibited by the Pub. Sts. c. 112, § 61. This section prohibits: first, an increase of capital stock beyond the fixed maximum ; secondly, a stock dividend ; thirdly,

a division of the proceeds of the sale of stock; and, fourthly, the issue of stock when the par value has not been paid in cash. Consequently, a stock dividend is not necessarily an increase of capital, although the latter ordinarily is a result of the former, nor necessarily an issue of stock for which the par value was never paid, since there are distinct prohibitions against such increase and such issue, and the words "stock dividend" will otherwise have no separate meaning. A gratuitous distribution of stock, no matter whether treasury stock previously unissued or stock once issued and bought back, as here, is a stock dividend.

This position is sustained by the third prohibition of § 61. There can be no legal division of the proceeds of the sale of stock, whether it be stock then first issued, or stock formerly issued and subsequently acquired by the corporation. Equally, the second prohibition applies to both descriptions of stock. The purpose of the section evidently is to make a comprehensive prohibition of the gratuitous division of the stock or capital as distinct from the earnings. Being a stock dividend, it was and is illegal, not only by the provisions of the section, but also upon general equitable grounds. A corporation has no right to make such a dividend, and can be restrained, upon application of a shareholder or of a creditor.

4. The Commonwealth is entitled to an injunction against such a stock dividend: 1st. As a creditor of the defendant, holding its bonds to a large amount. 2d. As a remainderman with vested rights of purchase. St. 1867, c. 270, § 17. 3d. As a sovereign, at the suit of the Attorney General, for violation of express statutes, and on general equitable grounds.

5. If not a stock dividend, then it is a gratuitous distribution among the shareholders of corporate property or assets, both inequitable and illegal. It is not a distribution of surplus profits. Upon its face it is a distribution, not of surplus profits, but of stock, with very different resultant liabilities, both as to shareholders and creditors. Whatever surplus profits had accumulated in the past, they did not then exist as actual cash, but had been applied otherwise by the directors. The value of the stock so distributed, even at its cost price, and much more at its market value, exceeded the profit and loss balance then on

the books of the defendant. *Williams v. Western Union Telegraph*, 9 Abb. New Cas. 419. *Hatch v. Western Union Telegraph*, 9 Abb. New Cas. 430.

6. Whether a gratuitous distribution of stock or of assets, the shares were obtained by incurring a bonded indebtedness, and the distribution is, in fact, that of capital or of borrowed money. It is an act of waste, as if the defendant had sold its rolling stock and divided the proceeds, and such waste the Commonwealth may enjoin, in its capacity as creditor and in its vested right to purchase.

7. The St. of 1882, c. 121, does not authorize such distribution by the defendant. The words, "and thereupon said corporation shall hold and dispose of the shares of stock so assigned to it as its absolute property," clearly do not sanction a departure from the established policy of the Commonwealth, nor a violation of the laws thereof. They free the shares from certain trusts theretofore existing, and enable the corporation to own and hold its own shares, since otherwise they would have been cancelled, *ipso facto*.

A. L. Soule, for the defendant.

C. ALLEN, J. The Pub. Sts. c. 112, § 61, forbid a railroad corporation, without authority of the General Court, to increase its capital stock beyond the fixed maximum, to declare a stock dividend, to divide the proceeds of the sale of stock among its stockholders, or to issue certificates of stock when the par value of the shares so issued is not first paid in cash to its treasurer. It is contended on the part of the Commonwealth that the actual and the intended distribution of shares by the defendant are in violation of this section, such distributions being stock dividends. Literally, they are so; but it is certainly open to grave doubt whether a division of shares which have once been fully paid for to a corporation, and have since been purchased by such corporation with its surplus earnings, would fall within the mischief intended to be guarded against by the statute, and properly be termed a "stock dividend" within its meaning. We give no further consideration to this question, because the surplus earnings do not appear to be sufficient fully to cover the distribution which the second information alleges is intended, and because we are of opinion that the informations must be dismissed upon



another ground, namely, that by a fair construction of the St. of 1882, c. 121, the authority of the General Court was given for the division of the shares in question.

The Commonwealth sustained towards the defendant a double relation, as sovereign and as shareholder. Wishing as shareholder to negotiate an exchange of its shares for bonds of the corporation on certain terms, it enacts as sovereign that, upon such assignment to the corporation of the shares, the corporation shall hold and dispose of the same as its absolute property. It was known that the corporation had undivided surplus earnings to a large amount, which entered into and increased the market value of the shares. At the end of the first fiscal year after the passage of the St. of 1882, these surplus earnings amounted to \$2,632,921. It is implied in the information, and conceded in the argument, that these surplus earnings might have been divided among the stockholders. The price of the shares transferred by the Commonwealth was \$3,858,400. The St. of 1882, in express terms, authorized the corporation to dispose of the shares assigned to it by the Commonwealth; but on the literal construction of the Pub. Sts. c. 112, § 61, now insisted on, the corporation would not be at liberty to divide the proceeds of such sale among its stockholders, even to an amount equivalent to its surplus earnings. The fact that the payment for the shares was made wholly in bonds, instead of being made partly in bonds and partly by the direct application of surplus earnings in the form of cash or cash assets, cannot be of such significance as to change the rights and obligations of the corporation. Its financial condition would in effect remain the same. Upon the construction contended for by the Commonwealth, if surplus earnings had been used directly in payment for these shares, the corporation would thereby have lost the power in any form to divide such earnings or their equivalent among its stockholders, and the authority to purchase, hold, and dispose of the shares so assigned to it as its absolute property would be a restriction instead of a privilege. But the Legislature plainly was intending to confer a privilege, to add something to the powers which the corporation would otherwise have possessed. It is argued that the intention was to free the shares from certain trusts theretofore existing, and enable the corporation to own and hold its own

shares, since otherwise they would have been cancelled *ipso facto*. We are not aware of any such trusts that would not be extinguished by the mere transfer of the shares; and it has not been considered in this Commonwealth that shares in a corporation are necessarily extinguished by being transferred to the corporation, so that they cannot be reissued, or that the amount of capital stock is thereby reduced. *Crease v. Babcock*, 10 Met. 525, 556. *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 402. *Dupee v. Boston Water Power Co.* 114 Mass. 87, 43. Nor has such a rule prevailed in this country generally. *City Bank v. Bruce*, 17 N. Y. 507. *Coleman v. Columbia Oil Co.* 51 Penn. St. 74. *State v. Smith*, 48 Vt. 266, 285. *Williams v. Savage Manuf. Co.* 3 Md. Ch. 418, 452. *Taylor v. Miami Exporting Co.* 6 Ohio, 176, 219. *Robison v. Beall*, 26 Ga. 17, 28. *Hartridge v. Rockwell*, R. M. Charl't. 260. See also *Currier v. Lebanon Slate Co.* 56 N. H. 262, 268.

There was therefore no occasion to add the clause in question for the purposes suggested in the argument for the Commonwealth. These purposes failing as an explanation, no other purpose is suggested to account for the language of the statute. We are left to put such a construction upon it as it naturally bears, in view of the circumstances under which the statute was passed, having regard to the financial condition of the corporation, and to the position of the State as a contracting party, certainly intending to offer to the corporation some inducement to make the purchase. The natural meaning of the words used imports an authority to dispose absolutely of all the purchased shares, free from all conditions and restrictions. They are classed together as a whole. Whatever authority is given in respect to any of them is given in respect to all. It can hardly be supposed, under any circumstances, that the Legislature would intend to restrict the distribution of purchased shares equal in value to the amount on hand of surplus earnings, which might be distributed at the pleasure of the corporation. Looking at the whole statute, we are brought to the conclusion that the past and contemplated action of the corporation is within its authority.

*Informations dismissed.*

## EDWARD MCGIVNEY vs. PETER MCGIVNEY.

Suffolk. March 24. — June 30, 1886. W. ALLEN & HOLMES, JJ., absent.

A. sent from a distant State to B., the husband of his sister C., in this Commonwealth, where A. formerly resided, a sum of money, which B. deposited in a savings bank, subject to the order of A. upon him therefor. C. bought a parcel of real estate here, and obtained from B., and used in part payment for the same, a portion of A.'s money which he had so entrusted to B. C. then wrote a letter to A., which informed him of such purchase, and contained the following language: "I could not make the purchase until I prevailed after a hard struggle with B. to let me have a little of your money, which he gave me on these terms, that the deed should be made out in my name, that at my death all should be yours; all B. wants is a living out of it whilst he lives, and if you don't approve of this letter, all the favor I ask of you is to give me one or two years, and I will pay you up your money with thanks, for so doing you will be the means of making me a home whilst myself and husband lives, and after that it is your property forever." A. received this letter, but did not answer it. C. lived in possession of the estate for nearly eight years, when she died, leaving a will, by which she devised the estate to B. for life, and, after his decease, to D., another brother, in fee, upon the conditions that he should pay the expenses of her last sickness and funeral, and should also pay to A. a certain sum larger in amount than that part of his money used as above stated. A. was, soon afterwards, informed of the contents of the will. B. went into possession of the estate, and held it until his death, twenty years after that of C. D., who had lent C. sums of money, and had also paid the expenses of her last illness and funeral, then took possession of the estate. D. knew, at the time of the transaction, that a part of A.'s money was used without his consent by C. in paying for the estate. A., upon hearing of B.'s death, returned to this Commonwealth, and brought a bill in equity against D. for the conveyance of the legal title to the estate, having refused a tender by D. of the sum directed to be paid him in C.'s will. *Held*, that A., by his laches, had lost the right to assert any claim to the estate which he might have had otherwise; and that he was entitled only to the sum given him by the will of C., with interest from the time of B.'s death.

BILL IN EQUITY, filed November 9, 1885, for the conveyance of the legal title to a certain parcel of land in Boston. Hearing before *Gardner, J.*, who reported for the consideration of the full court the following case:

In March, 1852, the plaintiff, then living in Boston, left for California, where he resided until October, 1885, when he returned to Boston. Mary O'Riley, a sister of the plaintiff and of the defendant, and the wife of Thomas O'Riley, lived in Boston with her husband. Prior to the year 1857, the plaintiff sent to Thomas O'Riley \$1200, which money Thomas deposited in

savings banks in Boston for safe keeping, subject to the order of the plaintiff upon Thomas therefor.

In September, 1857, Mary purchased a house in Billerica Street in Boston, described in the plaintiff's bill, subject to a mortgage of \$2000. She paid in cash, at the delivery of the deed, \$1000, of which sum she obtained \$400 from her husband Thomas, and which he took from the moneys of the plaintiff, then held by him, Thomas, as above stated. On December 18, 1857, Mary, who could only write her name, engaged one Edward Tirrell to write a letter to the plaintiff, the material part of which was as follows:

"I bought a house on Billerica Street, No. 29. It is a first rate brick house  $3\frac{1}{2}$  stories in height containing 16 rooms. . . . I bought it for \$3000 and it is considered the cheapest house ever was sold in Boston; it has a good yard & shed and our passageway on our own land . . . . alone Brother Edwd I could not make the purchase until I prevailed after a hard struggle with my husband Thomas to let me have a little of your money which he gave me on these terms that the deed should be made out in my name (Mary O'Reilly) that at my death that all should be yours all Thos. wants is a living out of it whilst he lives & if you don't approve of this letter all the favor I ask of you is to give me 1 or 2 years and I will pay you up your money with thanks, for so doing you will be the means of making me a home in Boston whilst myself and husband lives and after that it is your property forever."

Her husband Thomas had full knowledge of the contents of this letter. The plaintiff made no answer to it, although he received it in California. The defendant advanced, as a loan to his sister Mary, \$200 at the time of the purchase of the house, which sum was then used in part payment of the mortgage on said house. The defendant, at the time that the \$400 of the plaintiff's money was obtained by Mary from her husband Thomas, and used by her, as above stated, in part payment for the house, had full knowledge of the transaction and of the fact that the \$400 so used by Mary was the money of the plaintiff, and so used without his consent. The defendant paid \$83, the full amount of the funeral expenses and those of the last sickness of his sister Mary. He also lent to his sister Mary \$175 in April, 1859.

Mary O'Riley died on July 21, 1865, leaving a will, admitted to probate in December, 1865, by which she devised said real estate to her husband Thomas for life, and, after his decease, to the defendant in fee, upon the conditions that he should pay the expenses of her last illness and funeral, and should also pay the sum of \$500 to the plaintiff. Thomas O'Riley died in July, 1885, having been in the possession of the house and real estate since the death of his wife. After the death of Thomas, the defendant took possession of the same, and is still in possession, having, before the filing of the plaintiff's bill, tendered \$500 to the plaintiff, which he has refused to receive.

The defendant was in California when his sister Mary died, and within a year after returned to Boston, when he wrote to the plaintiff about the will, giving him a general account of the contents, and stating that the plaintiff was legatee to the amount of \$500, to which the plaintiff made no response. The plaintiff, upon hearing of the death of Thomas O'Riley, returned to Boston, and brought this bill.

The plaintiff, when in California, received the following letter from Thomas O'Riley, to which the plaintiff made no answer:

"My dear Edward, — You may feel easy about your money, that is all right. Your money is all sure for you. . . . I know this much that she wished to keep the house in the family as long as she could. She knew that if she would make it over to you that you would sell it before six months and that Peter would not so she willed the house to Peter on conditions that he shall pay you over before he gets possession all your money and in case that you should die before that time your children gets it or their ears."

*J. A. Maxwell*, for the plaintiff.

*W. H. Harrington*, for the defendant.

GARDNER, J. The plaintiff contends that he has an equitable interest in the house and land in Billerica Street in Boston, which he can reach through this bill in equity, and apply in payment of his debt. If his money was used in the purchase of this estate without his knowledge or assent, he may have had an equitable lien thereon, and he may have been entitled to relief. *Bresnihan v. Sheehan*, 125 Mass. 11, and cases cited.

The case finds, however, that his sister, Mary O'Riley, purchased the house in September, 1857; and that in December of that year she wrote to the plaintiff, then in California, informing him that she had used part of his money in its purchase, "and at her death all should be his." In case the plaintiff did not approve of this, she asks him to let it remain for one or two years, and that then she will repay him. The plaintiff received this letter, and made no answer to it. It is fair to presume that the plaintiff was willing to let the sum of \$400 remain in the house for the benefit of his sister, according to her request.

The plaintiff contends that the letter of Mary O'Riley to him contains a good declaration of trust, in the following language: After a hard struggle, Thomas let me have a little of your money, which he gave me on these terms, that the deed should be made out in my name, that at my death all should be yours. All Thomas wants is a living out of it while he lives, and if you don't approve of this letter, all the favor I ask of you is to give me one or two years and I will pay you up your money with thanks; for so doing you will be the means of making me a home in Boston whilst myself and husband live, and after that it is your property forever. This letter contains a statement of the misappropriation of the \$400 of the plaintiff's money by Thomas O'Riley, and an offer on the part of Mary to repay it in one of two ways. The plaintiff made no election. He did not notify Mary of any intention to elect. He never answered the letter. Mary lived in possession of the estate until July 21, 1865, when she died testate. The plaintiff was soon after notified of the contents of her will, which provided that Thomas O'Riley was to have a life estate in the house; that, upon his death, the defendant should take the estate upon condition that he paid the expenses of the last sickness and funeral of Mary, and also paid \$500 to the plaintiff.

The defendant contends that, if the plaintiff intended to rely upon an equitable interest in the house, or upon the alleged declaration of trust, he should, immediately upon the receipt of the information concerning the will and its provisions, have notified the defendant of his intention; that it was his duty then to have enforced his claim upon the estate. Mary died in

1865. Thomas died in 1885. During twenty years the plaintiff has been silent. In the mean time, the defendant knew of the original wrong taking of the \$400, and that the plaintiff had been informed of it, and that he had full knowledge of the contents of the will, and of the further fact that the defendant had lent \$200 to his sister Mary upon the purchase of the house. The defendant, through the silence of the plaintiff, was led to believe that he acquiesced in the disposition of the estate by the will of Mary. He was induced to believe that it was not necessary for him to press his claim as a creditor against the estate of Mary. He relied upon the will, and, according to its terms, soon after the death of Mary, paid the expenses of her last sickness and funeral. We think that the silence of the plaintiff, after he had knowledge of the provisions of the will of Mary O'Riley, is decisive. *Plymouth v. Russell Mills*, 7 Allen, 438, 444. By his own laches, the plaintiff has deprived himself of any right or benefit which he might have had, if he had exercised proper diligence. His silence in relation to the will, after he had been informed of its provisions regarding himself and the defendant, induced the defendant to believe that the plaintiff fully acquiesced in its provisions. It is now too late to set up any claim he may have had to the estate, if in season he had insisted upon it.

The plaintiff is entitled to \$500, under the will of Mary O'Riley, with interest from the time of the death of Thomas O'Riley. Upon the payment of this sum by the defendant into the clerk's office, the bill will be dismissed.

*Decree accordingly.*

FRANK B. DOLE & others *vs.* JOHN WOOLDREDGE  
& another.

Suffolk. March 25. — June 30, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

A bill in equity against A. was inserted in a writ dated April 20, 1882. Issue was joined on October 2, 1883. In December, 1883, A. had the case set down for a hearing upon the merits, and insisted upon a hearing unless certain attachments of real estate made upon the writ should be postponed to certain conveyances which he wished to make. An agreement to this effect was made, and the hearing was postponed. On February 21, 1884, the plaintiff filed an amended bill, joining B. with A. as a party defendant. This bill charged no new matter of substance against A. On September 23, 1884, A. filed an application that issues of fact be framed, and that the same be tried by a jury. Process was not served upon B., and he did not appear as a party. On September 25, 1884, A. filed an answer to the amended bill, which differed from his answer to the original bill only in demanding a jury trial. Issue was joined on the amended bill and answer on November 21, 1884. *Held*, that A., by setting down the case for a hearing in December, 1883, had waived a right to a trial by jury; and that the subsequent amendment did not avoid the effect of the waiver. *Held, also*, that the judge, to whom the application to have issues framed for the jury was made, did not, in the exercise of his judicial discretion, err in refusing to allow them to be framed.

At the hearing of a suit in equity against A. and B. for conspiring to defraud the plaintiff, no exception lies to the admission in evidence, in behalf of the plaintiff, of declarations of B. relating to the conspiracy, if there is then evidence in the case of the existence of the conspiracy, and the plaintiff offers to produce further evidence, although B. has not been served with process, and has not appeared as a party defendant.

The giving in evidence by one party of part of a conversation entitles the other party to introduce so much of the rest of it as relates to the same subject.

The plaintiff filed interrogatories to a witness, whose deposition was to be taken on a commission. The defendant objected to each and every interrogatory for form and substance, and waived the filing of cross-interrogatories. The plaintiff then filed additional interrogatories, to which the defendant made the same objections, and also waived the filing of cross-interrogatories. The additional interrogatories were not answered. *Held*, that this fact did not entitle the defendant to have the deposition excluded.

A bill in equity against A. and B. alleged that B., the owner of a mine, conspired with A. to call the price of the mine \$200,000, and, in pursuance of such conspiracy, A. and B. made certain representations to the plaintiff, whereby he and A. agreed to buy the mine at that price, organize a corporation to work the mine, and transfer the mine to the corporation, the stock to be distributed between the plaintiff and A. in proportion to their interests in the mine; that in fact B. was willing to sell the mine for \$100,000, and received only this amount, the plaintiff paying for his interest at the rate of \$200,000, and A. receiving the difference. *Held*, that the bill did not allege such a scheme to defraud the public as to prevent the plaintiff from maintaining the bill against A.



**BILL IN EQUITY**, inserted in a writ dated April 20, 1882, brought originally by Frank B. Dole, James P. Cook, Benjamin O. Cutter, and Charles A. Sinclair, against John Wooldredge alone, and containing the following allegations:

1. On or about July 15, 1878, the said Wooldredge introduced to said James P. Cook the subject of the purchase of 'a mine in Placerville in the State of California, known as the Prospect Flat mine, and spoke to him about said purchase from time to time, and from time to time read to him extracts from letters purporting to be written to said Wooldredge by one J. H. Purkett, the agent of the owner of said mine, describing said mine and setting forth its great value, and stating that it could be purchased of its owner, one Horatio L. Robinson, who then was and now is an inhabitant of said Placerville, for the sum of one hundred and twenty-five thousand dollars. During the fall of the year 1879 said Wooldredge again spoke to said Cook about said mine, and told him that it had largely increased in value, and that he, said Wooldredge, had received a letter from said Purkett stating that said Robinson had sold a part of said mine and now asked the price of two hundred thousand dollars for the remaining portion, whereas the whole of said property might have been purchased before for one hundred and twenty-five thousand dollars. He further represented to said Cook, that said mine was turning out well, and that it was too bad to lose the chance of purchasing the remainder of said mine at the price of two hundred thousand dollars, and urged the said Cook to join him in the purchase of said mine at that price, and proposed to send out an expert to examine said mine and report upon its condition and value.

2. Subsequently, and in consequence of these representations, and at the request of said Wooldredge, the said Cook introduced said Wooldredge to the said Dole and the said Sinclair, and the said Wooldredge had several conversations with them and with said Cutter in regard to said mine, and said Wooldredge read to them letters from said Purkett and others in reference thereto, and it was finally agreed between the plaintiffs and the said Wooldredge that said Cutter, who was engaged in the mining business, should, with said Dole and Wooldredge, visit and examine said mine, and that in case they should think

favorably of the same, they, with the said Wooldredge, would buy said mine, or such portion as remained in said Robinson's hands, at the lowest price at which it could be bought, but that the sum of two hundred thousand dollars might be paid therefor, provided it could not be bought at a lower price; and that thereupon a corporation should be organized to work said mine, and that the same should be transferred to such corporation, and that the stock of such corporation should be distributed to the plaintiffs and to said Wooldredge in proportion to their shares or interests in said mine. And it was further agreed, that the parties in interest should pay for and hold said mine and the stock of said proposed corporation in the following proportions: John Wooldredge, four sixteenths; James P. Cook, three sixteenths; Charles A. Sinclair, three sixteenths; Frank B. Dole, three sixteenths; Benjamin O. Cutter, three sixteenths.

3. In consequence and in pursuance of said agreement, said Wooldredge, Dole, and Cutter, on or about February 16, 1880, proceeded to Placerville aforesaid; [and said Cutter having examined said mine and being of opinion that it was a valuable one,] said mine was purchased from said Robinson for the alleged sum of two hundred thousand dollars, he to allow the purchasers five thousand dollars out of said sum for their expenses; and a deed of said mine was executed by said Robinson, upon March 1, 1880, to said Wooldredge and Dole, for the benefit of the parties interested as above. And subsequently, and in pursuance of the agreement among all the parties in interest, a corporation was organized, called the Lyon Gravel Gold Mining Company, to which a portion of said mine was conveyed and transferred, and the shares were allotted to said Wooldredge, Cook, Dole, Sinclair, and Cutter, in the proportions above set forth: said Wooldredge four sixteenths, and the said Cook, Dole, Sinclair, and Cutter, three sixteenths each. And subsequently another corporation was formed, called the Kum Fa Gold Mining Company, to which the remaining portion of said mine was conveyed, and shares were allotted to the stockholders of the Lyon Gravel Gold Mining Company in proportion to their respective interests therein.

4. Said Wooldredge, in all his conversations with the plaintiffs, or with either of them, always represented to them that the

price of said mine was two hundred thousand dollars, and that it could not be purchased for any less sum; and the said Wooldredge stated further to the said Cutter and to the said Dole, that he paid to the said Robinson his full proportion of money, and that he had sold securities in San Francisco to procure the necessary funds, and, in order to get a deed, promptly advanced for the plaintiffs the sum of forty-eight thousand seven hundred and fifty dollars, which the plaintiffs afterwards paid him in Boston, with interest; and the said Robinson, in conversation with said Dole and said Cutter, always stated that two hundred thousand dollars was the price, and the lowest price, for which the said mine could be purchased. All the negotiations with said Robinson were carried on by said Wooldredge as the partner and agent of the plaintiffs, and the sale was finally arranged and completed by him. Said sale being determined upon, the plaintiffs paid their proportion of said two hundred thousand dollars, less five thousand dollars allowed for expenses, as follows: to wit, ninety-seven thousand five hundred dollars were paid by them directly to said Robinson through his agent, the said J. H. Purkett, and forty-eight thousand seven hundred and fifty dollars, with interest thereon, were paid by them to said Wooldredge to reimburse him for that amount which he claimed to have paid to said Robinson in cash on their account, as above set forth. And the plaintiffs were informed and assured by the said Wooldredge that he had not only advanced the said sum of forty-eight thousand seven hundred and fifty dollars on their account, but that he had duly paid his share, amounting to forty-eight thousand seven hundred and fifty dollars, making, as he alleged, in all the sum of one hundred and ninety-five thousand dollars.

5. The statements of the said Wooldredge and of the said Robinson as to the price of the said mine, and as to the amount paid to said Robinson therefor, were wholly false; and the said Wooldredge, conspiring and arranging with the said Robinson to cheat and defraud the plaintiffs, agreed with said Robinson that they should call such price two hundred thousand dollars, and that the statements made to the plaintiffs by said Robinson as above set forth were made in pursuance of such arrangement and conspiracy; the price of said mine was a very much less

sum than the price named, [and said Wooldredge paid, and said Robinson received, a very much less sum, the precise amount of which the plaintiffs are unable to state, but which, according to their information and belief, was not over one hundred thousand dollars; and the difference between said sum and the sum of two hundred thousand dollars, alleged to have been paid, was and is now fraudulently retained by the said Wooldredge in his hands.]

6. The fact of said fraudulent conspiracy and agreement, and the fact that the price paid to said Robinson was not said sum of two hundred thousand dollars, but was a very much less sum, as is hereinbefore set forth, was fraudulently concealed from the plaintiffs, and they have only discovered the same within a very short time; and upon the discovery of said fraud, and of the facts herein set forth, they demanded of said Wooldredge that he should reimburse to them the money so fraudulently received, which he has wholly declined and refused to do.

The prayer of the bill was that said Wooldredge be required to disclose and state the amount actually paid for said mine, and be decreed to pay over to the plaintiffs the sum fraudulently obtained and withheld by him, in proportion to their interest in said mine when purchased; and for further relief.

The answer, filed June 22, 1883, denied that the defendant made any false statements or representations to the plaintiffs, or either of them, relative to said mine or the price of the same; that he conspired and arranged with said Robinson to cheat and defraud the plaintiffs as is alleged in said bill, or in any manner whatever; and that he at any time received, or now has in his hands, any moneys to which the plaintiffs are in any way entitled.

It appeared from the record that issue was joined on October 2, 1883.

On February 21, 1884, the plaintiffs filed an amended bill, which was allowed the same day, making Robinson a party, and containing the same allegations as in the original bill, with these exceptions and additions:

In paragraph 3 of the original bill, the words now enclosed in brackets were omitted in the amendment, and the following were inserted in place of them: "that said Cutter examined said mine and was of opinion that it was a valuable one. And

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your orators say that the said respondents had theretofore formed a conspiracy to defraud your orators in the purchase of said mine, and that the doings of said Wooldredge hereinbefore set forth were in pursuance of said conspiracy, and that after the examination of said mine by said Cutter, and in pursuance of said conspiracy, negotiations were resumed by said Wooldredge, acting as partner and agent of your orators, and well known by said Robinson to be acting in that capacity; that"

In paragraph 5 of the original bill, the words now enclosed in brackets were omitted in the amendment, and the following were inserted in place of them: "said Wooldredge paid nothing to said Robinson, and if he paid anything to said Robinson the amount thereof has since been returned to said Wooldredge, or is held by said Robinson for the benefit of said Wooldredge; said Wooldredge paid and said Robinson received for said mine a sum very much less than two hundred thousand dollars, to wit, the sum of ninety-five thousand dollars, and said Robinson has either paid over to said Wooldredge, or holds for his benefit, all sums of money paid to said Robinson in excess of said purchase money, to wit, ninety-five thousand dollars. It was agreed between said Wooldredge and the plaintiffs, as hereinbefore set forth, and with the knowledge of said Robinson, that your orators should pay three fourths of the purchase money of said mine, and in consequence thereof the proportion which the plaintiffs were bound to pay was three fourths of the amount received by said Robinson, to wit, three fourths of ninety-five thousand dollars, and said Wooldredge and said Robinson, and each of them, in pursuance of said conspiracy and as a result thereof, have received and now fraudulently withhold from the plaintiffs a large sum of money, to wit, the difference between three fourths of the amount of purchase money received by said Robinson and the entire amount of money paid by the plaintiffs to said Robinson and said Wooldredge, or either of them, as hereinbefore set forth, to wit, seventy-five thousand dollars and interest."

The prayer of the amended bill added the name of Robinson.

On September 23, 1884, the defendant Wooldredge filed an application that issues of fact be framed, and that the same be tried and determined by a jury.

On September 25, 1884, Wooldredge filed an answer to the amended bill, which was in the same words as the answer to the original bill, except in referring to the bill as the "amended bill," and with this addition: "And this defendant demands a trial by jury upon all material issues of fact essential to the determination of this suit."

The record stated that issue was joined on November 21, 1884.

On September 30, 1884, Wooldredge filed a paper suggesting the following as proper issues to be framed for a jury, and demanded a jury trial:

"1. Did the said Wooldredge and Robinson, prior to February 16, 1880, form a conspiracy to cheat and defraud the complainants in the purchase of said mine, as alleged in said amended bill?

"2. What was the actual price paid by the purchasers of said mine?

"3. In the purchase of said mine, did the defendant Wooldredge obtain any benefit, advantage, or profit over the other purchasers thereof, as alleged in said amended bill?"

On November 29, 1884, *Field, J.*, overruled Wooldredge's motion that issues be framed, and filed the following memorandum:

"In addition to the facts that appear of record, I find that the defendant, in December, 1883, had the cause, upon the pleadings as they then stood, set down for a hearing upon the merits before a single justice of this court, and insisted upon a hearing unless some agreement could be made whereby the attachment of real property made under the writ should be postponed to certain conveyances which Mr. Wooldredge desired to make; that an agreement was ultimately made to this effect, and the defendant did not then insist upon the hearing. Before the application made by the defendant for issues to a jury, the plaintiffs had never moved the court for a hearing. On the facts appearing of record from the papers on file, and the facts not of record found by me, I was of opinion that the defendant was not entitled to issues to a jury as of right, and so ruled; and ruled that it was a matter of discretion to be exercised according to the practice of courts of equity. As a matter of discretion, I was not satisfied that the cause could be tried more intelligently by a jury than without a jury, and I overruled the motion that issues to a jury be framed."



Wooldredge appealed from the order overruling the motion that issues be framed, and also filed a bill of exceptions to the order, which embodied the judge's memorandum, as above set forth.

The case was then heard on the merits, before *W. Allen, J.*, the evidence being taken before a commissioner; and the judge filed the following memorandum of his decision:

"1. The decisive question is whether the ostensible price, \$195,000, was the price actually paid; if it was, the plaintiffs paid only their proportion; if the actual price was less, all that the plaintiffs paid over three fourths of it was for the benefit of the defendant, and was obtained by his fraud, in which Robinson participated.

"2. The burden of proving that the ostensible was not the real price is upon the plaintiffs; and upon this question the declarations of Robinson are not competent; nor are they to be received as contradicting or corroborating his testimony in his depositions.

"3. The statements of Robinson in his depositions are entitled to no weight except as corroborated.

"4. The evidence proved that the price paid was \$100,000; that \$97,500 was paid by the plaintiffs on or about March 1, 1880, and that the defendant paid nothing at that time and nothing subsequently, except \$2500, with, perhaps, interest upon it; and that subsequently to March 1 the plaintiffs paid to the defendant \$48,750, with interest from that date, to refund to him a payment which he represented that he had made at that time.

"5. There is not proof of any illegal purpose in the purchase such as will prevent the plaintiffs from recovering from the defendant the money obtained from them by his fraud.

"6. The plaintiffs are entitled to recover the \$48,750, and so much of the \$97,500 as exceeds \$75,000 (which is three fourths of the price paid), being \$22,500, both sums amounting to \$71,250, with interest from March 1, 1880."

A decree was accordingly entered for the plaintiffs; and the defendant Wooldredge appealed to the full court.

Annexed to the record was a report of the testimony taken by the commissioner, in which appeared several exceptions to the admission of evidence. These appear in the opinion.

*F. A. Dearborn*, for Wooldredge. 1. The defendant was entitled to a jury trial, as of right.

Article 15 of the Declaration of Rights is as follows: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the Legislature shall hereafter find it necessary to alter it."

This suit is undoubtedly a controversy concerning property, as well as a suit between two or more persons. Unless it is within the exception, the defendant is clearly entitled to demand a jury trial at some stage of the proceedings.

"The whole difficulty as to the first part of the inquiry (in which cases parties have a constitutional right to demand a jury) would seem to lie in settling the historical question, as to what cases were and what were not tried by jury before the adoption of the Constitution." Aldr. Eq. Pl. 161. *Powers v. Raymond*, 137 Mass. 483. This test for cases, where the constitutional right does or does not exist, is applied in other States. *Wheelock v. Lee*, 74 N. Y. 495. *Whitehurst v. Coleen*, 53 Ill. 247. *Mead v. Walker*, 17 Wis. 189. *Thomas v. Bibb*, 44 Ala. 721. *Mathews v. Tripp*, 12 R. I. 256. *North Pennsylvania Coal Co. v. Snowden*, 42 Penn. St. 488. The framers of the colonial charters were little disposed to establish a system of equity. In New England and Pennsylvania there was no such system, and only slowly and jealously were equity powers conferred upon the courts to soften the unyielding spirit of the law in such cases as mortgages, penalties, and trusts. 7 Dane Abr. 518, 519.

The defendant in an equity suit has a constitutional right to a trial by jury, especially where the remedy sought is legal in its nature. *Franklin v. Greene*, 2 Allen, 519, 522. *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45. *Powers v. Raymond*, *ubi supra*.

In *Charles River Bridge v. Warren Bridge*, 6 Pick. 376, 399, a bill to enjoin a nuisance, brought under the St. of 1827, c. 88, Parker, C. J., said: "Whenever a party in a suit in equity shall require that any controverted fact be tried by a jury, the

court, by force of the article above mentioned [Art. 15], will be obliged to order an issue for that purpose, and thus the constitutional security is preserved."

In *Franklin v. Greene*, *ubi supra*, an equity suit to restrain a foreclosure, and recover notes alleged to have been obtained by fraud, Chapman, J., said: "In this Commonwealth the right of trial by jury is secured by the Constitution."

Our courts have gone no further in restricting the right, than to decide that a plaintiff, having voluntarily chosen an equity tribunal, cannot claim a jury as a matter of right. *Ross v. New England Ins. Co.* 120 Mass. 113. This case clearly recognizes a defendant's right to a jury.

The defendant's right to a jury, under the Constitution, is clearly recognized in other States. Thus, in New York, where chancery powers existed at the time of the adoption of its constitution, it is nevertheless held that the joinder of an equitable cause of action with others purely legal does not deprive the defendant of his right to a trial by jury. *Wheelock v. Lee*, *ubi supra*. *Bradley v. Aldrich*, 40 N. Y. 504. *Hudson v. Cary*, 44 N. Y. 553.

If this rule shall be followed, can there be any doubt that an action would lie at common law in favor of these plaintiffs to recover the \$48,750, which the opinion finds the defendant represented he had paid to Robinson for them in the purchase of Robinson's quarter? If so, has not the defendant a right to demand a jury at least on that part of the case? *Marston v. Brackett*, 9 N. H. 336, 349. *Hoitt v. Burleigh*, 18 N. H. 389. *Stillwell v. Kellogg*, 14 Wis. 461.

The exception in Article 15 of the Declaration of Rights, "except in cases in which it has heretofore been otherways used and practised," relates to the local use, law, and practice in this State at the time of the adoption of the Constitution. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 368.

This differs materially from the provisions of some other constitutions, as, for example, that of Vermont, which contains the more general declarations that trial by jury "ought to be held sacred" upon "any issue in fact proper for the cognizance of a jury," which was held to relate to the future, as well as the past, in *Plimpton v. Somerset*, 33 Vt. 283, 291.

So under a constitution which declares directly, and not in the form of an exception, that trial by jury shall continue "as heretofore, and the right thereof remain inviolate," it is held that the Legislature cannot give a court of equity, acting without a jury, power to determine legal rights, unless there is some equitable ground of relief. *Haines's appeal*, 73 Penn. St. 169. *North Pennsylvania Coal Co. v. Snowden*, *ubi supra*. And it is also held that trial by jury may be withheld from new tribunals created by statute, and not clothed with common law powers, "because 'heretofore,' that is, at the common law, which antedated our constitutions, trial by jury did not exist in such cases." *Rhines v. Clark*, 51 Penn. St. 96, 101. *Haines v. Levin*, 51 Penn. St. 412.

The Constitution of Georgia, of 1798, which provides (art. 4, § 5) that "trial by jury, as heretofore used in this State, shall remain inviolate," was adopted ten years after the similar article in Massachusetts. Probably the latter article was in the minds of the framers of the former, and "heretofore used in this State" was doubtless intended to have the same meaning as the Massachusetts provision, the framers of all the constitutions of the original States aiming to establish like commonwealths. *Harper v. Elberton*, 23 Ga. 566.

In *Hargraves v. Lewis*, 3 Kelly (Ga.) 162, 168, it is said: "It was at one time a question in Georgia, whether a jury was at all necessary in trials in equity. That is to say, whether the act of 1799, conferring chancery powers on the superior courts, did not clothe the judge with the powers of a chancellor in England. I advert to this not for the purpose of discussing the question, but of saying that such a doubt no longer exists; that the usage of the superior courts for a long series of years has been to submit the facts in all trials in equity to a jury, and that this usage has been sanctioned by repeated acts of the legislature recognizing it. I have no doubt but that it had its origin in quite sufficient authority of law. In Georgia the judge and the jury constitute the chancellor."

Church, C. J., in *People v. Justices*, 74 N. Y. 406, gives to the constitutional provision in New York, that the "trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," direct application to the previous use, practice, and

condition of things in that State thus: "This means a common law jury of twelve men. Courts of special sessions have existed since 1744, and have been continued both under the colonial and state government to the present time. No jury was permitted in these courts until 1824. . . . A trial by such a jury was not used at the time of the adoption of the present Constitution in trials by courts of special sessions for the offence charged against the relator in this case."

So in Massachusetts, the above provision has been repeatedly construed with reference to the usage as to juries here, and not elsewhere. Thus, in *Shirley v. Lunenburg*, 11 Mass. 379, 385, relating to the removal of a pauper, Parker, C. J., said: "This case comes within the exception to that general provision of causes which were used and practised otherways before the adoption of the Constitution. For, from the settlement of the country, all questions relative to the settlement or removal of paupers were heard and determined by the Courts of General Sessions of the Peace, without the intervention of a jury." So, probate causes are within this exception, because locally the use and practice here did not authorize a jury in such cases. "Before the adoption of the Constitution, and for some time after, all appeals from judges of probate were heard and determined by the Governor and Council, without a jury." Gray, C. J., in *Davis v. Davis*, 128 Mass. 590, 593.

Cases of divorce and alimony fall within the exception, for the reason that jurisdiction in them was vested in the Governor and Council until transferred to this court by the St. of 1785, c. 69, and a trial by jury was never had in them until allowed on libels for divorce by the St. of 1855, c. 56. *Bigelow v. Bigelow*, 120 Mass. 320

So, a complaint to collect a fine under the militia law, was a case in which a jury was not "heretofore used" in Massachusetts. *Mountfort v. Hall*, 1 Mass. 443, 455, 457.

"Whether the framers of the Constitution, and the people, had reference to those former chancery tribunals, when they adopted the exception to the general provision in the 15th article, may admit of question; we are inclined to think, however, that the word 'heretofore' in the exception could hardly be applicable to a practice which had ceased to exist nearly a

century before the Constitution was adopted." Per Parker, C. J., in *Charles River Bridge v. Warren Bridge*, 7 Pick. 368.

A constitution, like a statute, is held to have been prepared and adopted in reference to the local laws and events then existing, and the evils to be remedied in the locality where it is to take effect. It does not relate to substantially new proceedings, and rights arising after the adoption of the constitution. *Commissioners v. Morrison*, 22 Minn. 178. *People v. Potter*, 47 N. Y. 375. *People v. Fancher*, 50 N. Y. 288. *Whitehurst v. Coleen*, *ubi supra*. *Triggally v. Memphis*, 6 Cold. 382. *Kennedy v. Gies*, 25 Mich. 83. *Sims's case*, 7 Cush. 285, 295.

It thus seems clear that the exception in the Declaration of Rights, Art. 15, must relate to the common law and usages existing in this State at the time of its adoption, and not to the English law or practice. The common law of England did not itself include the older English statutes, some of which form a part of our common law, and the English common law came into "use and practice" here only so far as it was applicable to our condition. 1 Kent Com. 472, 473. *Elder v. Burrus*, 6 Humph. 358, 366. *McManus v. Carmichael*, 3 Iowa, 1.

So to our common law are further added local tradition, and ancient usages which apparently originated in laws enacted by the Legislature of Massachusetts Bay, and which were annulled by the repeal of the first charter. *Commonwealth v. Knowlton*, 2 Mass. 530, 534. *Commonwealth v. Churchill*, 2 Met. 118, 123.

The chancery powers exercised by the courts of Massachusetts in existence at the time of the adoption of the Constitution (1780) were very limited, extending only to granting relief in cases of mortgages and penal bonds. Aldr. Eq. Pl. 2. *Harvard College v. Theological Society*, 3 Gray, 280, 282.

There was no equity jurisdiction for discovery until the St. of 1818, c. 122; nor in partnership transactions, until the St. of 1823, c. 140; nor in cases of fraud, until the St. of 1855, c. 194, nor in cases where there is not a plain, adequate, and complete remedy at law, until the St. of 1857, c. 214.

The equity powers gradually given to the court were exercised cautiously and with strict reference to the class of cases

named in the statutes. *Harvard College v. Theological Society*, *ubi supra*. *Dwight v. Pomeroy*, 17 Mass. 303, 327. *Charles River Bridge v. Warren Bridge*, 6 Pick. 395, and 7 Pick. 370.

This court has decided that the case at bar is cognizable at equity, if at all, solely on the grounds that it may be a partnership transaction, or that the remedy at law is not so plain as in equity, neither of which constituted a ground for equitable jurisdiction at the time of the adoption of the Constitution. *Dole v. Wooldredge*, 135 Mass. 140.

The exception of cases which have "heretofore been otherwise used and practised," refers to cases used and practised in Massachusetts, and not used and practised generally in England and other States. The latter construction would deny to the defendant his right of jury trial in almost every case. The widest diversity of practice prevailed among the States as to trial by jury when our Constitution was adopted.

In consequence of this diversity among the States, and the impracticability of arriving at a common understanding, the Federal Constitution was silent as to trial by jury in civil cases. This silence gave great offence, especially in Massachusetts, where it was proposed to insert a provision for trial by jury, with an exception in the language of our own Constitution. The opposers of the proposed provision showed that such an excepting clause for a Federal Constitution would deny trial by jury in almost every case, so much diversity on the subject prevailed in the States. Debates in Mass. Convention of 1788, 216.

It can scarcely be supposed that the founders of the Massachusetts Constitution intended to make so radical a change in their legal procedure as to deprive a party of a jury trial, if it should appear that, although trial by jury had in a particular case been used and practised in Massachusetts, a contrary practice prevailed in some other State. Yet such would be the logical deduction if the wide construction of the excepting clause now objected to shall be held the true one.

It is also worthy of notice, as showing the desire of our ancestors to preserve trial by jury, that the first draft of the Massachusetts Constitution omitted entirely the excepting clause, which was afterwards added by the committee. Journal of Convention (1779-80), 152.

If "heretofore used and practised" meant used and practised anywhere, or even generally, the power given in Article 15 to the Legislature to dispense with a jury, if it saw fit, in cases arising on the high seas and relating to mariners' wages, was superfluous. Admiralty powers already existed in England and in other States.

Since trial by jury was the rule, and trial without jury the exception, the plaintiffs must satisfy the court that the case at bar is such a case as it was the usage and practice to try without a jury when the Constitution was adopted. If the question is left in doubt, that doubt must be resolved in the defendant's favor. The plaintiffs cannot bring themselves within the exception by showing that in Massachusetts, at the time of the adoption of the Constitution, the case at bar could have been tried neither at law nor equity, since, if not triable at all, it cannot be said that the practice and use were to try without a jury. If a remedy at law existed, a jury trial must be granted, though the mode of obtaining that remedy be arduous, as by a multiplicity of suits, or not so plain as in equity. The plaintiffs' convenience cannot take away the defendant's constitutional right.

2. The defendant has not waived his right to a trial by jury. Setting a case down for a hearing does not amount to a waiver, unless a trial is entered into. No Massachusetts case has gone further than to say that submitting to trial without demanding a jury was a waiver of the right. See *Shaw v. Norfolk County Railroad*, 16 Gray, 407; *Atlanta Mills v. Mason*, 120 Mass. 244; *Parker v. Nickerson*, 137 Mass. 487; *Pomeroy v. Winship*, 12 Mass. 518, 524; *Elliott v. Balcom*, 11 Gray, 286.

"Whenever a party is concluded by his own act, and held to have waived any right or privilege, such act should not be left doubtful, but should plainly and explicitly appear. Every reasonable presumption should be made against the waiver, especially when it relates to a right or privilege deemed so valuable as to be secured by the Constitution." *United States v. Rathbone*, 2 Paine C. C. 578. This case held that the defendant had not waived his right to a jury by agreeing on the record to a certain referee, when the order of reference had been made against his objection.



In *People v. Albany & Susquehanna Railroad*, 57 N. Y. 161, the defendant did not claim a jury until the plaintiff had read his pleadings and opened his case. It was held no waiver. Johnson, C., said: "I find nothing which, as authority, stands in the way of settling this question upon reasonable grounds, and cannot consent to hold that a party may be deemed precluded by acquiescence who claims his right to a jury trial before a witness has been sworn or examined. A party cannot be deprived of this, his constitutional privilege, by a mere technicality."

*Wheelock v. Lee*, *ubi supra*, was a case in which legal and equitable causes of action were joined; and it was held that the defendant had not waived his right to a jury "by consenting that the case be placed on the calendar for trial at the special term, and by noticing the case for trial at that term." See also *Colman v. Dixon*, 50 N. Y. 572.

The Louisiana Code of Practice provides that "the defendant, who wishes for a trial by jury, must pray for it in his answer, or previous to the suit being set down for trial." In *Louisiana State Bank v. Duplessis*, 2 La. An. 651, it was held that, where the case had been several times set down for trial and continued, and it did not appear that at the time of asking for a jury it was so set down, the defendant had not waived his right to claim a jury. This case was cited and followed in *Gallagher v. Hebrew Congregation*, 34 La. An. 526, which was an action to subject the defendant's property to the plaintiff's judgment lien, and, before the defendant's claim for a jury, had been assigned for trial six times.

The Tennessee Code requires the chancellor to empanel a jury to determine issues of fact on the application of either party. A suit in chancery to settle and wind up a partnership was brought in May, 1873; an amended bill was filed in December, 1873, and answered in February, 1874; a second amended bill was filed in April, 1874, and answered in July, 1874. Testimony was taken, down to September, 1876. In April, 1877, the cause was ready for a hearing, and on April 18th was in order for trial by the court. Before the calling of the docket, the plaintiff demanded a jury, and was refused, and the case was heard by the court. The higher court held that a jury should have been granted, and that the demand might be made at any time before

the case was, in fact, heard, and a new trial was granted. *Allen v. Saulpaw*, 6 Lea (Tenn.) 477. See also *Benbow v. Robbins*, 72 N. C. 422; *Hinchly v. Machine*, 3 Green (N. J.) 476.

Can the court say, in the light of these decisions, that the defendant's act in "setting down the case for a hearing upon the merits before a single justice of this court, and insisting upon a hearing unless some agreement could be made whereby the attachment of real property made under the writ should be postponed to certain conveyances which the defendant desired to make," showed a plain and explicit intention to waive his constitutional right?

3. The defendant, by claiming a jury in his answer to the amended bill, is reinstated in any rights he may have waived. It is well settled that, if an amendment makes a material change in the bill, the defendant has a right to a new defence. The situation of the defendant was changed by the amendment. Before the amendment making Robinson a party, his testimony could be obtained only by deposition, or by his voluntary appearance as a witness. A deposition of a witness living in California and constantly travelling, might be difficult for the plaintiffs to take; whereas, if Robinson should voluntarily submit himself to the jurisdiction of the court, — an act over which the defendant Wooldredge had no control, — his testimony could be readily taken by interrogatories. With this contingency in view, the defendant might well say that he desired such testimony to be presented to a jury.

4. This court, in its discretion, should grant a trial by jury of the disputed facts necessary for the determination of the suit.

Very many cases are found in the reports in which the court has, in the exercise of its discretion, framed issues for a jury after the filing of a master's report, and even after a refusal of a request for a jury, a hearing on the merits, and an appeal to the full court. *Pomeroy v. Winship*, *ubi supra*, where a deed relied on by one party was sought to be impeached as fraudulent by the other. *Crittenden v. Field*, 8 Gray, 621, a suit to restrain the obstruction of a mill privilege. *Franklin v. Greene*, *ubi supra*, a bill for an injunction, and to recover mortgage notes. *Stockbridge Iron Co. v. Hudson Iron Co.*, *ubi supra*, a bill to reform a contract. *Atlanta Mills v. Mason*, *ubi supra*,

a bill to restrain the defendant from flowing the plaintiff's land by a dam. *Ross v. New England Ins. Co.*, *ubi supra*, a bill to reform an insurance policy. *Harris v. Mackintosh*, 133 Mass. 228, a bill to enjoin the exercise of an offensive trade.

Such questions as arose in this case are tried every day by juries in common law courts. Would it be held a proper exercise of judicial discretion in a judge of the Superior Court, to withhold from the jury, had he the power, such questions whenever they arose?

The position of the defendant, in asking for a jury, was one of much merit. If it be held that he had waived his right to a jury, it was only by the technical operation of a rule which has never been stated by the court, and which he was not morally bound to know, if he were legally; and weight ought to be given to the request of a party, even where the court would not, of its own motion, have framed issues. In marking the cause for a hearing, he was compelled to this action to relieve himself from the immediate burden of the plaintiffs' attachments, and when an arrangement was made in this matter, he, in deference to the wishes of the plaintiffs, forbore to press the hearing, thus, as he supposed, restoring matters to their former condition.

The amendment to the bill was filed afterwards, and was immediately followed by the answer, in which was the claim of a jury. Certainly the defendant cannot be charged with laches in point of time.

On these considerations, it is submitted that the judge below erred in refusing the motion for a jury, and this error should now be rectified by the court. In the words of Staples, J., in *Williams v. Blakey*, 76 Va. 254: "As a general rule, where the credit and accuracy of the witnesses are impeached, or where the evidence is clashing and conflicting, rendering it necessary to weigh the character and credibility of the witnesses, or where the evidence is so equally balanced on both sides that it becomes doubtful which scale preponderates, an issue ought properly to be directed."

[The argument on the other points is omitted.]

*N. Morse & S. Lincoln*, for the plaintiffs.

C. ALLEN, J. The defendant's counsel has made an excellent argument in this case, which has received our full consideration;

but we have come to the conclusion that the decision of the justice before whom the case was heard must stand.

Assuming, without deciding, that the defendant might have insisted upon a trial by jury as a matter of constitutional right, if his demand therefor had been seasonably made, we are of opinion that he waived this right. That such right may be waived is clear. *Parker v. Nickerson*, 137 Mass. 487, 492. The cause was at issue on October 2, 1883, and under the 28th Chancery Rule then in force, (new rules, No. 27,) it was to be considered as ready for a hearing one month later. By the rules prescribing the order of business in Suffolk County, a weekly list of matters to be heard in equity before a single justice was made up for Tuesday of each week, on which cases might be set down, either by motion to the justice at his first coming in on any previous day, or by agreement of counsel and notice to the clerk of the court. These rules were made in pursuance of the provision of the Gen. Sts. c. 118, § 26, (Pub. Sts. c. 151, § 33,) allowing the court to make rules regulating the practice and proceedings of the court in matters of equity, so as to discourage delays and expedite the decision of causes. The cause being thus ready for a hearing, two courses were open to either party wishing to move in the matter. One was to proceed in the usual manner in equity causes, and apply for a hearing before a single justice, unless it was desired to send the case to a master. The other course was, under the Pub. Sts. c. 151, § 27, to request the court to frame issues of fact to be tried by a jury. In order to avail himself of the right of a trial by jury, if he had such right, it was necessary for the defendant to make an application to the court under this statute. Having this election of methods of trial, the defendant, in December, 1883, had the cause set down for a hearing before a single justice. This, under the rule, was no doubt done on a day previous to the day fixed for the hearing. It was necessary to notify the other side that the cause had been thus set down. Parties are to have time to make needful preparations for trial. This course of action was inconsistent with an intention or expectation on the part of the defendant to have a jury trial. It was a formal and significant act, showing an election by him to have the cause tried before a single justice, without a jury. It was not

done through any misleading, or surprise, or misapprehension, or inadvertence. Indeed, the testimony of the clerk of the court shows that the cause was set down for a hearing twice in December, 1883, and again on February 20, 1884; though he does not testify, and the record does not show, that at either of these times it was so set down by the defendant. The finding of the justice is, that in December, 1883, the defendant had the cause set down for a hearing upon the merits before a single justice of this court. We cannot regard this otherwise than as showing an intention on the part of the defendant at that time not to ask for a trial by jury. He himself elected the other method.

It is then to be considered whether this state of things was changed by anything that occurred afterwards. The judge finds, that the defendant insisted upon a hearing, unless some agreement could be made whereby the attachment of real property made under the writ should be postponed to certain conveyances which he wished to make; that an agreement was ultimately made to this effect, and the defendant did not then insist upon the hearing. In other words, the hearing was then postponed by agreement. But such postponement, under such agreement, did not of itself vary the legal effect of the defendant's act in setting the cause down for a hearing. Cases are always liable to be postponed by agreement, or by order of the justice for good cause shown. If the defendant wished to restore himself to the right of having a trial by jury, which he had waived, he should have made that a part of the stipulation. He did not do so. There is nothing to show that he then understood or wished that the case should be tried before a jury, or that he should be reinstated in his right to such trial.

Nor did the subsequent amendment to the bill have that effect. This was filed and allowed on February 21, 1884. No new matter of substance is charged in the amended bill against the sole defendant now before us. The original bill alleged that the defendant, conspiring and arranging with Robinson to cheat and defraud the plaintiffs, agreed with Robinson that they should call the price of the mine \$200,000, and that the statements made to the plaintiffs by Robinson were made in pursuance of such arrangement and conspiracy; that the price was

much less, and that the defendant paid and Robinson received much less. The answer to the bill is very general; but it denies that the defendant made any false statements or representations to the plaintiffs, or that he conspired and arranged with Robinson to cheat and defraud the plaintiffs. The main object of the amendment was to make Robinson a party to the suit, and to charge him also with conspiracy and fraud. He never was served with process, never appeared, and is not before us. The defendant filed a new answer to the amended bill, but not till after he had filed a separate request for a jury trial. The new answer is in the same words as the original answer, except in referring to the bill as "the amended bill," and in adding a demand for a trial by jury. It is not contended by the defendant that his situation was changed by the amendment in any respect, except by its making Robinson a party. He says that, before the amendment, Robinson's testimony could be obtained only by deposition, or by his voluntary appearance as a witness; whereas, if Robinson should voluntarily submit himself to the jurisdiction of the court, — an act over which the defendant Wooldredge had no control, — his testimony could be readily taken by interrogatories; and, with this contingency in view, the defendant might well say that he desired such testimony to be presented to a jury.

The answer to this is twofold. In the first place, Robinson never in fact appeared as a party, and so the position of the defendant Wooldredge remained unchanged. Besides, if Robinson had appeared, answers made by him to interrogatories propounded under the statute would not be competent to affect Wooldredge, the latter having no opportunity to cross-examine him. The decision in *Stetson v. Wolcott*, 15 Gray, 545, only held that interrogatories may be addressed to one of several defendants, without including all the defendants, in an action of contract; and that his answers thereto are admissible in evidence for the plaintiff. The objection there raised was, that the questions should have been proposed to all the defendants, and their joint answers taken. Statements made by a conspirator long after the completion of the fraudulent enterprise, which are merely narratives of past occurrences, are not competent to affect others. 1 Greenl. Ev. § 111. And the fact that such

statements might be obtained by means of interrogatories under the practice act would not change the general rule of law.

The question remains, whether, as a matter of judicial discretion, the judge erred in refusing to frame issues for a jury. An important element in the determination of this is the time when the application to the court was first made. This was on September 23, 1884, twenty-nine months after the filing of the bill, almost twelve months after the parties were at issue, and more than nine months after the defendant had set down the cause for a hearing before a single justice. No time has been fixed by any rule or general order of court within which a party must request the court to frame issues for a jury in an equity cause. But the recent policy of the legislation in this Commonwealth has been, that cases at law as well as in equity should be tried before the court without a jury, unless an early demand for a trial by jury is made. By the St. of 1874, *c.* 248, a party desiring a trial by jury in a civil action in this court or in the Superior Court must file a notice to that effect within such time after the parties are at issue as the court may by general or special orders direct. By the St. of 1875, *c.* 212, such notice might be filed before the parties were at issue, as well as after. Such is the law now. Pub. Sts. *c.* 167, § 69. Ten days after the filing of the answer or plea, in this court, and after the parties are and are required to be at issue, in the Superior Court, is the latest time allowed by the rules for the filing of such notice, unless there is a special order extending the time. See Rule 8 of this court, and Rule 16 of the Superior Court. After the defendant's long delay, in the present case, and after his own act of setting the case down for a hearing before a single justice, we cannot say that, as matter of judicial discretion, issues for a jury ought to have been framed.

We have examined all the cases cited for the defendant, and find none which in our opinion should lead us to a different result. The decisions in New York rested upon a particular provision of the Constitution of that State, prescribing how the right of trial by jury may be waived; those in Louisiana, upon a particular provision in the code of that State; and that in Tennessee, upon an express statute. Decisions upon such points, made in jurisdictions where the systems and methods of procedure may be different from our own, cannot be of controlling weight with us.

The defendant took various exceptions to the admission of evidence at the hearing.

In the first place, he insists that the court erred in admitting evidence of declarations of Robinson before there had been evidence to establish a conspiracy. These declarations were in furtherance of the object of the alleged conspiracy. The justice before whom the trial was had stated that there was some evidence of a conspiracy already, and an offer to produce further evidence; and that it was a mere question of the order of proof. In this there was no error. *Burke v. Miller*, 7 Cush. 547. 1 Greenl. Ev. § 111.

The defendant then objects that the court went too far in allowing Dole, on his reëxamination as a witness for the plaintiffs, to testify to what was said in a certain interview between himself and Sinclair (two of the plaintiffs) and Robinson, at the Astor House in New York. The situation was as follows: Robinson gave two depositions to be used in the case. The first was given to the defendant; the second, to the plaintiffs. In the first, he testified that he received \$195,000 for the mine; in the second, that he received \$100,000. The interview in question was after the first deposition, and before the second had been given. On his cross-examination by the defendant, Dole was asked if he had an interview with Robinson, when and where and how long it was, if they met by appointment, who were present, if he brought a deposition home from New York, if he knew who went out to Palmyra to take the last deposition of Robinson, if he employed any one to go there, or if he knew who did. The cross-examination then proceeded as follows:

Q. You were present at another interview?

A. A few days afterwards.

Q. Where you and Robinson were present, and Sinclair?

A. Yes, sir.

Q. At which time Robinson told you and Sinclair that he had given his deposition?

A. Yes, sir.

Q. State all he said about it on that point.

A. I asked him if he was willing to come to Boston and testify in this case, and state the facts, or if he was willing to give a deposition if we wanted it. He said, "I have already



given an affidavit," was the way he expressed it, "and it has been sent to my counsel in Boston, or has been filed in court there." I said, "I don't think that is so; I have never heard of any deposition, I have never seen any, and I don't think it can be possible that your deposition has been filed in court in Boston up to this time." He said it certainly had; and I insisted that it certainly had not, to my knowledge.

Q. And Mr. Sinclair was there?

A. Yes, sir.

Q. And heard that?

A. I think he heard it. It was said in his presence and mine.

Q. What did Sinclair say?

A. He said, as I did, that the deposition had not been filed; at least, he had n't access to it; and I think he told Mr. Robinson that his counsel was not obliged to file it, and probably never would.

This fairly opened all that was said in that interview with Robinson on the subject of the deposition he had given, or which he was asked to give; whether Robinson said he would testify for the plaintiffs or not; what testimony he said he would or could give for the plaintiffs; and what requests he said had been made to him not to testify further, or not to come to Massachusetts. These in general were the subjects of the reëxamination; they were not matters new in themselves, or unconnected with the statements elicited on cross-examination, or remote and distinct from that which was the subject of inquiry and investigation on the part of the defendant in cross-examination, but they have a natural and close connection with it. *Commonwealth v. Keyes*, 11 Gray, 323. *Straw v. Greene*, 14 Allen, 206. *Prince v. Samo*, 7 A. & E. 627. 1 Greenl. Ev. § 467.

The defendant's objection that the witness Chester should not have been allowed, on his reëxamination, to testify to the conversation in an interview between himself and Robinson and the plaintiff Sinclair at the Windsor Hotel in New York, rests on the same grounds as that which we have just considered. Sinclair had already testified to the whole conversation. Chester, on his cross-examination by the defendant, was asked as to certain portions of this conversation, including various things said to Robinson by himself and by Sinclair. All the matters to which he

was allowed to testify in his re-direct examination were admitted as portions of the same conversation, and not upon remote or distinct subjects.

The defendant objected to the admission of Robinson's second deposition, on the ground that several important and material interrogatories were omitted by mistake of the commissioner, and were not put to the witness at all. It appears that the plaintiffs filed a list of interrogatories to Robinson, to be annexed to the commission; that the defendant objected to each and every one, both for form and substance, and also waived the cross-examination; that the plaintiffs then filed certain additional interrogatories; that the defendant objected to each and every one of these, both for form and substance; and that no cross-interrogatories were put. In taking the deposition, no answers were given to any of the additional interrogatories. Under these circumstances, the defendant, having thus specially objected to all of these interrogatories, cannot now be heard to object that they were not answered.

The defendant further contends that the whole scheme of the enterprise, as alleged in the bill, was a fraud upon the public, illegal, and against public policy, and that the plaintiffs are entitled to no relief in equity, even if they were defrauded in such an undertaking. We do not, however, find any averments in the bill showing that any fraud upon the public was contemplated; nor do we see any occasion to set aside the finding that there was not proof of any illegal purpose in the purchase, such as would prevent the plaintiffs from recovering from the defendant the money obtained from them by his fraud.

The defendant objects that, in respect to one quarter part of the mine, which it was originally contemplated that Robinson should retain, but which was finally included in the purchase from him, and for which the plaintiffs paid \$48,750 to the defendant, the relation between himself and the plaintiffs was that of vendor and vendee, and that false representations made by a vendor as to the price which he paid for property do not constitute such a fraud as a court of equity will relieve against. But, on the evidence, we do not think this relation existed between the parties. On the other hand, the evidence is satisfactory to show that he assumed to act for the plaintiffs in the

matter, and treated the supposed purchase and payment by him as having been made for them, and gave them the option so to consider it until their return to Boston. The whole dealing between the parties was on this basis; and, when the plaintiffs finally paid the money to the defendant, it was as an adoption of his supposed act as an act of agency for them, and not as a purchase from a vendor.

The defendant finally contends that the evidence did not warrant the findings of the justice in relation to the alleged conspiracy between the defendant and Robinson, and to the amount of money paid for the mine. But an examination of the evidence shows that the findings were well supported.

*Decree for the plaintiffs affirmed.*

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**ALICE M. GRANGER vs. EDWARD K. PARKER & others.**

Norfolk. March 26. — June 30, 1886. W. ALLEN & HOLMES, JJ., absent.

If, in an action on the Pub. Sts. c. 175, to recover possession of certain premises, brought in a district court, which has jurisdiction of the cause and of the parties, judgment is rendered for the plaintiff, from which the defendant appeals to the Superior Court, and gives a bond, with sureties, to prosecute his appeal, and the action is entered and tried in the Superior Court, which affirms the decision of the district court, to which exceptions are taken, heard, and overruled in this court, and final judgment for the plaintiff is entered in the Superior Court for possession of the premises, it is not open to the principal or sureties, in an action upon the bond, to question the validity of the judgment on the ground that the appeal should have been completed by a recognizance instead of a bond.

CONTRACT on a bond, in the penal sum of \$3000, executed on December 21, 1882, to the plaintiff, by the first-named defendant as principal, and by the other defendants as sureties, and containing the following condition:

“The condition of the obligation is such, that whereas the said Alice M. Granger, by the consideration of the justices of the District Court of East Norfolk, holden at Quincy in said county of Norfolk, for civil business, on the twentieth day of December, in the year of our Lord eighteen hundred and eighty-two, by

assignment against the said Edward K. Parker, recovered judgment for the possession of a certain parcel of land with the buildings thereon," (then followed a description of the premises,) "which the said Alice M. Granger alleged that the said Edward K. Parker held unlawfully and against the right of her, the said Alice M. Granger, and also at the said court recovered fourteen dollars and forty-seven cents for costs. From which judgment the said Edward K. Parker appealed to the Superior Court, to be holden at Dedham, within and for said county of Norfolk, for the transaction of civil business, on the fourth Monday of December instant. Now if the said Edward K. Parker shall enter this said action, and prosecute his said appeal, pay all rent now due, all intervening rent, and all damages and loss which the said Alice M. Granger may sustain by reason of the withholding of the possession of the above-described premises, and by reason of any injury done thereto during such withholding, together with all costs until the delivery of the possession of said premises, in case the judgment from which this appeal is made is affirmed, then this obligation shall be void; otherwise, it shall be and remain in full force and virtue."

The answer admitted the execution of the bond, but averred that it was made under duress, and was invalid; and that the appeal should have been perfected by a recognizance instead of a bond.

Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, in substance as follows:

The writ in the original action, on the Pub. Sts. c. 175, was dated December 4, 1882. The case was entered and tried in said Superior Court, and a verdict was returned for the plaintiff, and judgment rendered thereon, on which execution issued, by which the plaintiff was put in possession of said premises.

The present action is brought to recover the rent, costs, and damages referred to in said bond. After the defendants had filed their answer, they filed a motion to dismiss the action for want of jurisdiction, on the ground that the appeal should have been taken by recognizance, as required by the Pub. Sts. c. 175, § 6, which motion was heard at a former term and overruled, and an appeal taken. The motion was renewed at the present term, and again overruled; and the defendants excepted.

The defendants admitted, that, if the plaintiff was entitled to recover on the bond, the condition of it had been broken ; and a verdict was rendered that the condition was broken, and damages were assessed for the plaintiff in the sum of \$533.77.

The defendants alleged exceptions.

*N. C. Berry*, for the defendants. 1. The St. of 1882, c. 95, which provides that the provisions of § 52 of c. 154 of the Public Statutes, " relating to the filing of bonds by parties appealing in civil proceedings in the municipal courts of the city of Boston and the execution thereof by attorneys of record, shall apply to the several municipal, police, and district courts in the Commonwealth," do not apply to § 6 of the Pub. Sts. c. 175, which provides that when the defendant appeals in a landlord and tenant action he shall recognize with sufficient surety or sureties to enter the action and pay all rent and damages, &c., if judgment be affirmed, except "when the action is brought in a municipal court, the defendant shall give a bond with sufficient surety or sureties, instead of a recognizance."

The act of amendment very carefully and accurately defines the act it amends, to wit, § 52, which authorizes the attorney of the appellant (plaintiff or defendant) to execute the bond in his behalf. But § 6 of the Pub. Sts. c. 175, does not authorize the attorney of the defendant to execute the bond in his behalf, for the obvious reason that the penalty is large, as in this case \$3000. Neither does this section apply to the appeal taken by the plaintiff.

The Public Statutes required all appeals taken from the district courts to the Superior Court to be by recognizance in civil actions, except appeals from the municipal courts. Pub. Sts. c. 155, §§ 29, 30 ; c. 154, §§ 39, 52.

Chapter 154 of the Public Statutes refers to transitory actions. This bond was taken in a local action. Pub. Sts. c. 175, § 3.

2. The appeal was void in this case. *Santom v. Ballard*, 133 Mass. 464. The judgment rendered against Parker is good until reversed. The other defendants in this case had no day in court, and interposed their objection to the bond at the earliest moment, and the action should be dismissed. *Fisher v. Shattuck*, 17 Pick. 252. *Boston v. Capen*, 7 Cush. 116, 124. *Elder v. Dwight Manuf. Co.* 4 Gray, 201. *Commonwealth v. Kelly*, 9 Gray,

259. *Ashuelot Bank v. Pearson*, 14 Gray, 521. *McQuade v. O'Neil*, 15 Gray, 52. *Newcomb v. Worster*, 7 Allen, 198. *Gray v. Thrasher*, 104 Mass. 373. *Riley v. Lowell*, 117 Mass. 76.

. This bond was not a voluntary one, because it was given by the principal defendant and his sureties under color of law, and executed by them, as will be presumed, because the district court required it, in order to perfect said appeal. *Commonwealth v. Kelly*, *ubi supra*. *Sweetser v. Hay*, 2 Gray, 49. *Boston v. Capen*, *ubi supra*. *Merrill v. Prince*, 7 Mass. 396. *Thompson v. Lockwood*, 15 Johns. 256. *Osborn v. Robbins*, 36 N. Y. 365. *Story v. Grannis*, 26 Barb. 122.

*J. F. Colby*, for the plaintiff.

C. ALLEN, J. The defendants, in various forms, take the objection that the bond declared on is wholly invalid, and that the appeal from the district court should have been completed by a recognizance instead of the bond. They contend that they made the bond under duress, by order of the district court; but offer no evidence of actual duress. They rely on the ground that it should be presumed to have been executed because the district court required it, in order to perfect said appeal. It is conceded that the district court had jurisdiction of the cause and of the parties. The judgment of that court being for the plaintiff, the defendant Parker sought to exercise his right of appeal to the Superior Court, and entered into the bond now in suit, this being the form of security adopted to make the appeal effectual. The defendants now contend that the form of security should have been a recognizance instead of a bond. There is no suggestion that the condition of the bond contains anything which the recognizance ought not to have contained. So far as appears, no question arose as to whether a bond or a recognizance was the proper form of security; the appeal was entered in the Superior Court, and tried there; the decision of the district court was affirmed; exceptions were taken, which were heard and overruled in this court, 137 Mass. 228; and judgment for the plaintiff was finally entered in the Superior Court, for possession of the premises. The proper parties were before that court; the subject was within its jurisdiction; and the only possible objection to its judgment is, that the defendant Parker did not file the proper form of security to get the cause properly transferred

there. Without now considering whether the security should have been by way of a recognizance instead of a bond, we are of opinion that the objection is not now open to the defendants. It might have been taken by the adverse party, or by the court itself, at any time before judgment. *Santom v. Ballard*, 133 Mass. 464. *Henderson v. Benson*, 141 Mass. 218. But where the objection to the jurisdiction in a civil action rests simply on the ground that the party appealing did not give security for the prosecution of his appeal in the proper form, but gave a bond instead of a recognizance, where there was no actual requirement to adopt the particular form of a bond, where the conditions of the bond are the same which are prescribed by statute, and it is not apparent that any injury can have resulted from the substitution of a bond in place of a recognizance, where no suggestion of a mistake in this respect was made in the appellate court, but the cause proceeded without any objection or suggestion of mistake to a hearing and final judgment, and where the party appealing thus got the full benefit of his appeal by an unobstructed and full hearing on the merits in the appellate court, it is not open to him afterwards to question the validity of the judgment on the ground of his own failure to furnish security in the proper form for the prosecution of his appeal. As to him, the judgment stands valid and irreversible. *Glazier v. Carpenter*, 16 Gray, 385. *Commonwealth v. Sullivan*, 11 Gray, 203.

But if the party himself is not entitled to a reversal of the judgment on a writ of error or review, neither can the sureties avoid it by plea and proof. There is no suggestion of any collusion or fraud on the part of the defendant in improperly submitting to a judgment in order to charge the sureties. The provisions of the bond are no more onerous than those which a recognizance would have contained. The bond contemplates precisely the proceedings which were actually had, and the result which was reached. The object for which it was given has been fully accomplished. The liability on a bond is no greater than it would have been on a recognizance. Execution is only awarded for so much of the penal sum as is due and payable in equity and good conscience. Pub. Sts. c. 171, § 10. The judgment being valid as against the principal, there is no good ground

upon which the sureties can impeach it. *Fall River v. Riley*, 140 Mass. 488. The difficulty with the argument of the sureties is, that the judgment was valid, and not void.

By putting the decision on the ground that the bond is valid at common law, if not as a statutory bond, we do not mean to intimate that a recognizance should have been taken.

*Exceptions overruled.*

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CYRUS H. PORTER vs. STANDARD MEASURING MACHINE COMPANY.

Suffolk. March 2. — July 1, 1886. W. ALLEN & HOLMES, JJ., absent.

A. and B. executed an agreement, which provided that, in consideration of an assignment to B. by C. of all right, title, and interest in a certain invention and the letters patent previously assigned to C. by A., B., in part payment therefor, would pay to A. a certain sum "on each and every machine manufactured by said B., his agents, successors, or assigns, and containing said patented improvements or either of them," within a stated time after making returns to A. of the number of machines manufactured by B. or his agents. *Held*, that A. was entitled to the royalty named in the agreement upon machines bought of a person who was adjudged, in a suit by B., to have infringed the letters patent owned by B. in manufacturing the machines, and for the use of which in the future B. received payment from the persons so buying them.

CONTRACT. Trial in the Superior Court, without a jury, before *Rockwell*, J., who, upon the defendant's motion, ruled that the plaintiff could not recover upon the facts alleged in his declaration; and the plaintiff alleged exceptions, which appear in the opinion.

*W. A. Macleod & M. F. Stevens*, for the plaintiff.

*T. L. Wakefield*, for the defendant.

DEVENS, J. We interpret the exceptions, as the parties have done at the argument, as raising the question whether the plaintiff can recover upon the facts stated in the declaration, the court having ruled that he could not.

The declaration sets forth an agreement, by which, in consideration of an assignment to the defendant by one Tapley of all



right, title, and interest in a certain invention in surface measuring machines and the letters patent previously assigned to Tapley by the plaintiff, the defendant, in part payment therefor, would pay to the plaintiff "the sum of ten dollars on each and every machine manufactured by said company, its agents, successors, or assigns, and containing said patented improvements or either of them." The defendant further agrees to keep regular accounts of the machines manufactured by it, its agents, successors, or assigns, to make regular returns thereof every three months to the plaintiff, and, within ten days after such returns, to pay the plaintiff his royalty.

The declaration further avers, that, in a suit brought by the defendant against one Teague and others in the Circuit Court of the United States, it was adjudged that such parties had manufactured and sold machines which infringed the letters patent owned by the defendant; that, by virtue of such adjudication, the defendant "had been enabled to control the machines manufactured by Teague and others;" that, by means of the rights thus adjudged to belong to it, the defendant had effected a settlement with many persons who had purchased such infringing machines, and had given them thereafter the right to use such machines as fully and completely as if they had originally purchased them from the defendant; and that, although the defendant received pay for such machines prior to the date of its last accounting, it refused, on demand, to account for such machines, the use of which it had thus sanctioned or permitted, or to pay the plaintiff any royalty thereon.

The defendant was, by the agreement thus set forth, the owner of the patent. It had a right to bring the action against Teague and others for the infringement, and, while the contract imposed no duty on the defendant thus to defend and protect the patent, if it saw fit to do so at its sole risk and expense, it would be entitled exclusively to the proceeds of the suit, as the injury was done to the property which it alone owned. The fact that, if such property could not be protected, the defendant would not be likely to continue to manufacture, however important to the plaintiff, would not entitle him, in the absence of any contract to that effect, to bring the suit, or share in the damages obtained by the defendant for injury to the patent.

But the plaintiff does not, as we construe his declaration, seek any portion of the damages that may have been collected of Teague and others, if any have been collected, which does not very distinctly appear. Nor apparently does he seek any which may have been received from the users of the infringing patented article, who were the vendees of Teague, for any use made by them previously to suit brought against, or settlement made with them. His claim is, that, when the defendant sanctions and permits an article to be thereafter used which would otherwise be an infringement of the patent, the defendant adopts the manufacturer of it as its agent. If this contention is correct, it is not important that the declaration does not set forth in terms that, by its acts, the defendant had recognized or made of the manufacturers of the machines thus licensed its agents. There was no demurrer to the declaration, and the ruling of the court was not upon the form of it, but upon the facts there alleged, however they might be set forth.

The phrase "manufactured by said company, its agents, successors, or assigns," should be construed so as to cover, not merely the case where a previous authority to manufacture was given, but also that which exists when, the article having been manufactured without previous authority, the owner of the patent, for a valuable consideration, adopts it, consenting to its use, and confers upon it all the privileges of the patent. The manufacture, an act originally unauthorized, is thus ratified and affirmed. The party entitled to the royalty should receive it, as all the benefit of his monopoly has been granted by the owner of the patent, who holds it on the agreement to pay such royalty on each article manufactured by himself or his authority.

In *Wilder v. Adams*, 16 Gray, 478, where a royalty was to be paid by the defendants for each safe manufactured and sold by them, it is said by Mr. Justice Hoar, "If a person had tortiously taken a manufactured safe from the defendants, and an action were brought, and the value of the safe recovered by them, this would certainly be equivalent to a sale, and certainly ought to subject them to the payment which they had contracted to make to the patentee in case of a sale." In a similar way, when the defendant, in the case at bar, permits articles made in violation of the patent to be used as if made under it, and receives

compensation therefor, he should be liable to the royalty contracted to be paid by him in case of manufacture. Thenceforth such machines are, by the power vested in the defendant to control the patent, and the authority it exercises in sanctioning their use, to be treated as manufactured under the patent, and not in hostility to it. The clause, "manufactured by said company, its agents, successors, or assigns," must have a reasonable construction, so as to protect the plaintiff whenever the defendant exercises its rights under the monopoly transferred to it. The sale of a patented article conveys by implication the right to use, or vend it to others to be used. An authority to manufacture a patented article conveys impliedly the right to use it, or vend it to others to be used. *Marsh v. Dodge*, 66 N. Y. 533. *Sizer v. Ray*, 87 N. Y. 220. *Steam Stone Cutter Co. v. Shortsleeves*, 16 Blatchf. 381. *Thomas v. Hunt*, 17 C. B. (N. S.) 188. Conversely, a promise to pay a royalty on every machine manufactured by one to whom the invention and the patent are transferred, or his agents, &c., implies a promise to pay it whenever, by his authority, such manufacture is justified.

It is the contention of the defendant, that, if actual damages were collected of the user of an infringing machine, it would to that extent reduce the amount for which the maker and seller would be liable; and that the collection of full damages from the maker and seller of infringing machines for the term of the patent authorizes the use of the infringing machine during the life of the patent. Hence the defendant argues that the collection from such users is only another way of collecting the damages for the infringement of Teague and others, who were the makers of the infringing machines, and would give the same right to the user as would any settlement with him. But the defendant had no right to collect damages from Teague and others, the makers of the infringing machines, or from the user thereof, in such manner or to such an extent as would invest the party infringing with a right to continue the use of the machine. As between the defendant and the owner of the royalty, the defendant, as owner of the patent, was entitled to receive compensation for the injury done thereto; but when, either by express license, or by receiving compensation therefor, he grants and sanctions the subsequent use of the infringing machine, he has, as between

himself and the owner of the royalty, treated it as manufactured by his agent. That which the absolute owner of a patent may recover, in an action against an infringer, whether maker, seller, or user, depends upon the question whether he intends to grant the right subsequently to use the infringing machine. The consequences of a recovery, with respect to the subsequent rights of parties, are modified by the measure of damages sought and adopted. If the patentee has an established patent fee or royalty, for which he permits any one to use his patent, and he recovers this, the right to use his invention would pass. If, on the other hand, he seeks only the profits derived from the use of the patent, or compensation for the injury done to him up to the time of suit by its use, the right to its continued use would not pass. In the case at bar, a recovery against the users of the machine for the profits made by them, or for the injury done to the defendant as owner of the patent, would only be for the use of the machine up to the time of recovery. It would not cover the value of the use for the entire period over which the patent right extends, or for the period during which the particular machine was capable of being used. If the defendant undertook to recover these, to that extent he would recover, not for the injury done to the patent, or himself as owner of it, but compensation for a use which he himself had authorized. *Sickels v. Borden*, 8 Blatchf. 535, 543. *Perrigo v. Spaulding*, 13 Blatchf. 389. *Steam Stone Cutter Co. v. Windsor Manuf. Co.* 17 Blatchf. 24. *Spaulding v. Page*, 1 Sawyer, 702. *Stutz v. Armstrong*, 25 Fed. Rep. 147.

Where the defendant has, for a compensation, permitted the use of otherwise infringing machines, we are of opinion that the plaintiff may require him to account for the royalty thereon, as on machines manufactured by himself or agents.

*Exceptions sustained.*

ALVAN ROGERS & others *vs.* HENRY P. HOLDEN  
& another.

Suffolk. March 16. — July 1, 1886. W. ALLEN & HOLMES, JJ., absent.

A. employed B. to sell his goods at prices not less than minimum prices, so called. B. sold goods to C., who knew of the limitations of B.'s authority, upon an agreement that he should settle with him for the goods at prices less than those limited. B. then sent an order for the goods to A. with the minimum prices marked thereon. A., who was ignorant of the agreement between B. and C., delivered the goods to C. with a bill of parcels containing the minimum prices, at which also the goods were charged to C. on A.'s books; and C. made no objection to the bill. C. settled with B for the goods, according to their agreement, at less than the minimum prices; and B. reported to A. that he had received payment of the amount stated in the bill of parcels. A. credited C, and charged B., with this amount on his books; and A. never had a final settlement with B. *Held*, that A. could maintain an action of contract against C. for the difference between the amount of the bill of parcels and the amount paid by C. to B.; and that A. had not, by novation, accepted B. as his creditor.

If an action for goods sold and delivered is referred to an auditor, whose report does not set out the evidence, but finds that charges for boxes, barrels, packing, and carting were on the bills of parcels sent with the goods, to which no objection was made at the time, and were in accordance with a custom of merchants, this court will not sustain an objection that no recovery can be had for the same.

If an action for goods sold and delivered is referred to an auditor, who does not report the evidence, his finding, allowing all the items of the account, including those which did not accrue within six years before the date of the writ, if he finds no fact in conflict therewith, is final, the case being tried on the auditor's report alone.

CONTRACT, upon an account annexed, for goods sold and delivered. The case was referred to an auditor, who found for the plaintiffs. At the trial in the Superior Court, before *Aldrich, J.*, the auditor's report was the only evidence offered by either party. The judge directed a verdict for the amount found by the auditor, and reported the case for the determination of this court. The facts appear in the opinion.

*G. A. Torrey*, for the defendants.

*D. C. Linscott*, for the plaintiffs.

GARDNER, J. 1. The defendants contend that, upon the report of the auditor, the plaintiffs cannot recover in contract; and that there were two courses open to them, one to ratify and adopt the contract of their agent, and the prices he had made, the other, to repudiate the contract and replevy the goods, or sue

for their value in trover. The law is clear, that, if the plaintiffs' property was sold by a person assuming to act for them, but without authority, and the plaintiffs waive the tort and ratify the contract, in an action against the purchaser they must ratify it as the agent made it. *Brigham v. Palmer*, 3 Allen, 450.

The case finds that one Norris was employed by the plaintiffs as their travelling agent, to sell their goods at prices not less than the so-called "minimum prices;" and that the defendants, from the commencement of their dealings with Norris, not only knew that he was the plaintiffs' agent, but they "had notice, at the times of the sales of the several bills of goods to them and at the times of settlement therefor, of the limitations of the authority of Norris, the plaintiffs' agent, to sell at prices not less than the so-called minimum prices."

The transactions between the defendants and Norris and the plaintiffs were as follows: Norris, the agent, made a schedule or order of the goods wanted by the defendants, and the minimum prices were marked thereon; at the same time, it was agreed between the defendants and Norris that the defendants should settle the bills at prices then agreed upon between them, and not according to the prices stated in the order. Norris sent the order to the plaintiffs at Boston, who shipped the goods ordered to the defendants, charged them on their books with the amount of goods shipped, at the prices stated in the order, and at the same time sent to the defendants, by mail, a bill of the goods, containing a description of the goods shipped and the prices, corresponding to the description and prices stated in the order by them received from Norris. After the defendants had received the goods, and the next time Norris went to the defendants' store, he settled the bill according to the prices agreed upon at the time the orders were given, and at less than the minimum prices, and receipted the bill in full sent by the plaintiffs to the defendants. He then informed the plaintiffs that he had collected of the defendants a certain sum of money, the sum so stated being equal to the full amount of the bill, when in fact he received a less sum. The plaintiffs thereupon credited the defendants with the amount paid as stated by Norris, and charged Norris with the money which he reported that he had received.

There were more than one hundred of these orders, and the transaction was substantially the same in each. The plaintiffs had no knowledge of the private agreement between the defendants and Norris.

There is sufficient evidence in these transactions to show that Norris and the defendants combined to deceive the plaintiffs, and that this was done by means of a pretended contract. The defendants ordered the goods of the plaintiffs at a certain price, which they did not intend to pay, and permitted the plaintiffs to charge them with the goods and send them bills for the same, at prices which they had agreed with Norris should not be paid. The plaintiffs now have the right to insist upon the execution of the contract which the defendants have, by implication, made. They ordered the goods at the minimum prices. When the goods arrived, and the bills with them, charging the defendants with the goods at the prices at which they were ordered, they did not refuse to receive the goods, nor did they notify the plaintiffs of any mistake in the price. By remaining silent while the numerous bills were sent to them, they have impliedly ratified the sale of the goods by the plaintiffs at the prices named in the bills. *Bearce v. Bowker*, 115 Mass. 129.

The defendants say, We did not make this contract, although we knew that Norris ordered the goods for us at the minimum prices, and although we received the bills of the goods at the same prices at which they were ordered, and we have remained silent ever since, yet we made an agreement with Norris — which we knew he was not authorized to make — to buy the goods at a less price. We think that the defendants cannot set up this agreement for the purpose of denying the contract which the law says exists between them and the plaintiffs. They will not be permitted to take advantage of their own wrong for their own benefit. *Hill v. Perrott*, 3 Taunt. 274. *Walker v. Davis*, 1 Gray, 506.

The case at bar is not to be confounded with *Jones v. Hoar*, 5 Pick. 285, *Brigham v. Palmer*, *ubi supra*, *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227, and other cases of that class, cited by the defendants for the purpose of showing that the plaintiffs cannot waive the tort and sue in contract, unless they bring their action upon the contract made by the agent Norris with the

defendants. The case at bar has in it an element which is wanting in all the above-cited cases. It is this: that the defendants knew that the agent Norris had no authority to make the contract which he attempted to make with them; that the agreement between them was a transaction to obtain the goods from the plaintiffs at a less price than they were willing to sell them. It brings the plaintiffs' case directly within that of *Hill v. Perrott*, *ubi supra*.

In the note to *Jones v. Hoar*, above cited, containing the opinion given in that case by Judge Strong in the Court of Common Pleas, a clear distinction is made between the case of *Hill v. Perrott* and those sustaining the doctrine contended for by the plaintiffs. In that case, Perrott had procured the delivery of the goods upon a pretended sale to one Dacosta, under the impression that the defendant was to be his surety; but the whole was a "swindling transaction," to enable the defendant to get possession of the goods. The court held that the law would imply a contract to pay for the goods on the part of the defendant, and that he could not be permitted to control this implication by setting up the sale to Dacosta, which he had himself procured, because no man can take advantage of his own fraud. Judge Strong, in his opinion, which met with the approval of the court, says: "Although the plaintiff, on account of the fraud of the defendant, might perhaps consider him as a trespasser, yet, as the transaction assumed the form of contract by the acts of the defendant himself, and the goods went from the possession of the plaintiff by his consent, and through the forms of a sale, if the plaintiff chose to consider it as a sale, I do not see how it would be competent to the defendant to dispute it. . . . It may be considered as belonging to a class of cases, where the plaintiff may maintain assumpsit on account of some act of the defendant, which varies it from the common cases of tort, and authorizes an action as upon a contract."

Upon the facts disclosed in the case at bar, we think the plaintiffs are entitled to maintain their action in contract.

2. The defendants contend that the plaintiffs cannot recover in any form of action,—clearly not in contract,—because the account between the plaintiffs and the defendants is balanced and closed, and the debt in suit stands charged upon the plaintiffs'



books to Norris. The auditor finds that the facts which have already been stated cannot be regarded as payment of these bills in full, as the plaintiffs made these entries on their books in ignorance of the real facts, and they have never had a final settlement with Norris. These charges and credits were apparently a convenient way of keeping the account with Norris, and were never intended as a transaction in the nature of a novation. We think that the auditor was correct in his finding.

3. The defendants also deny that the plaintiffs can recover for boxes, barrels, crates, packing, and carting. The auditor's report does not set out the evidence; it finds the facts only. He finds that these charges were on all the bills sent with the goods to the defendants, and also that they were made in accordance with the custom of Boston merchants. We see nothing inconsistent in this finding by the auditor, as matter of law.

4. The defendants further contend, that the plaintiffs cannot recover upon the items that did not accrue within six years before suing out the plaintiffs' writ. The auditor has allowed all the items, and he has found no fact in conflict with his conclusion. He has not reported the evidence, and his conclusion is therefore final.

This disposes of all the exceptions argued by the defendants.

*Judgment on the verdict.*

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#### ATTORNEY GENERAL *vs.* CITY OF BOSTON & others.

Suffolk. March 17. — July 1, 1886. W. ALLEN & HOLMES, JJ., absent.

Under the Pub. Sts. c. 50, § 22, giving city authorities the power, in their discretion, to construct sidewalks, they may remove a sidewalk bordering on a paved street. It is competent for the board of aldermen of the city of Boston to pass an order, directing the superintendent of streets to remove a sidewalk bordering on a paved street; and such order is not "executive" or "administrative," within the meaning of the St. of 1885, c. 266, § 6, vesting the "executive" power of the city government in the mayor, "to be exercised through the several officers and boards of the city in their respective departments, under his general supervision and control," and giving to such officers and boards, in their respective departments, "the direction and control of all the executive and administrative business of said city."

The board of aldermen of the city of Boston passed an order, directing the superintendent of streets to remove a sidewalk on a paved street within a specified time, and to pave that portion of the street covered by the sidewalk so as to conform to the adjoining part of the street, "the expense thereof to be charged to the appropriation for paving." There had been an appropriation for the paving department, at the beginning of the year, of a certain sum for the objects and purposes explained in the recommendations of the committee on paving, which included new work on streets already laid out and on those which might be petitioned for, and for repairs and maintenance of streets and roads. The St. of 1885, c. 286, § 6, provided that "no expenditure shall be made nor liability incurred for any purpose beyond the appropriation duly made therefor." *Held*, that the order was valid.

INFORMATION IN EQUITY, at the relation of owners of two estates in Boylston Street in the city of Boston, to restrain the city, its officers and agents, from enforcing an order, passed by the board of aldermen on August 3, 1885, as follows: "Whereas in the judgment of the board it will be most conducive to the convenience and interest of the city to remove the sidewalk on Boylston Street adjoining the Common, it is therefore ordered that the superintendent of streets be directed to remove said sidewalk at the expiration of fifteen days from the passage of this order, and to pave that portion of the street now covered by said walk so as to conform to the adjoining part of said street, the expense thereof to be charged to the appropriation for paving."

The defendants demurred to the information, for want of equity. Hearing before *C. Allen, J.*, who reserved the case for the consideration of the full court. The facts appear in the opinion.

*G. S. Hale*, for the plaintiff.

*A. J. Bailey*, for the defendants.

DEVENS, J. The St. of 1799, c. 81, § 1, provided that all streets in Boston shall be paved "agreeable to the following regulations, viz. The footpath or walk on each side of every street shall be of the breadth of one sixth part of the width of the whole street; and shall be laid or paved with bricks or flat stones, and secured with a beam or cut stone along the outside thereof; and the middle or remaining four sixths of every street shall remain as a passageway for carriages of burthen or pleasure." The same section provided that, in certain cases, "the breadth of the footwalk, and the ascent and descent, and the crowning of the pavement in every street, shall be regulated by

the surveyors of highways." The informant contends that this statute is still in force; and that there exists no power in the city government, or any of its branches, to cause the entire and permanent removal of a sidewalk on any paved street in the city of Boston.

The St. of 1799 does not, in terms, provide that every paved street shall have a sidewalk or footpath on each side thereof, but it does assume, by these regulations, that it will; and § 2 provides that, when the cartway in any public street is ordered to be paved, the owner of any abutting lot "shall, without delay, at his own cost, cause the footway in front of his ground to be paved with bricks or flat stones, and supported by timber or hewn stones, and kept in repair; the same to be done under the direction of, and to the approbation of, the surveyors of highways." In case such owner neglects to pave his footway, the surveyors are authorized to do it, and to recover of him the amount thus expended.

The St. of 1831, c. 17, treats the St. of 1799 as in force, and recognizes § 2 thereof as its principal object, by imposing upon the abutters upon macadamized streets in the city of Boston the same liabilities as would be created under the act of 1799, and the acts in addition thereto, by the paving of the street.

The St. of 1833, c. 128, provides that the city council of Boston "may, from time to time, by any ordinance or ordinances, empower the surveyors of highways of said city so to regulate the width and height of the sidewalks . . . as shall, in the judgment of said surveyors, be most conducive to the convenience and interest of said city, any law of the Commonwealth to the contrary notwithstanding." It further provides that the city council may "empower said surveyors to accept such sidewalks, after the same shall be put in good and perfect repair by the abutters . . . and . . . relinquished in writing to the said city, . . . and may also order that, after such relinquishment, such sidewalks may be maintained at the expense of said city."

The power of regulating the width and height of the sidewalks is given as a part of the power of accepting the same for the city when put by the abutter in good and perfect repair, and when also relinquished to the city they may thenceforth be maintained at its expense. The act does not make it the duty of the city,

through the surveyors, to accept the sidewalk prepared by the abutter on his relinquishment of it, nor does it compel the relinquishment by the abutter. Its object was to place within the control of the city the whole subject, and, under it, if it was not deemed necessary that any sidewalk should be constructed, it was not obliged to accept such sidewalk, and impose the burden upon the city. While the word "regulate," as applied to the sidewalks, may often imply the existence of the thing to be regulated, such is not an absolutely necessary construction. The power to regulate the use of the streets of a city implies the power to prohibit the use of them under certain circumstances. *Commonwealth v. Stodder*, 2 Cush. 562, 571. *Union Railway v. Mayor & Aldermen of Cambridge*, 11 Allen, 287, 294.

If the validity of the order here in question depended alone on the three statutes above cited, it may be doubted whether it could be held that they rendered it obligatory on the city, whenever a way was paved or macadamized, to provide it with sidewalks or footways, if, in the judgment of the authorities, these were not required.

These statutes, which related only to the city of Boston, were repealed by the St. of 1872, c. 303, (Pub. Sta, c. 50, § 22,) so far as they are inconsistent therewith. The St. of 1872 was a general statute, applicable to all cities of the Commonwealth which should accept the same. It was accepted by the city of Boston on May 21, 1872, and was consequently in force when the order in the case at bar was passed. The previous statutes which we have referred to as a part of the history of legislation on this subject had contemplated the grading and construction of sidewalks by the abutters. This provides for the construction of sidewalks by the city "as the public convenience may require," in such form and with such materials as it may deem proper, or for the completion of any partially constructed sidewalk to be thereafter maintained by the city, and for the assessment of the expenditure upon the abutter, deduction being made for previous assessments paid by him. There is nothing in this act which renders it obligatory upon any city accepting it to construct sidewalks upon any of its ways. Whether this shall be done is left to the discretion of its lawful authorities. If any statute previously existed compelling the construction of

a sidewalk in every paved street, this provision would be clearly inconsistent with the discretionary power given by this act, so far certainly as streets are concerned which up to that time had not been provided with sidewalks. It is urged that this power to construct sidewalks, even if it be discretionary, cannot be treated as giving authority to remove or dispense with them where they already exist. To hold thus would be to give too limited an interpretation to the statute. The general power to construct sidewalks in all streets or not, whether macadamized or paved, must be construed as one which deals with the whole subject, and places it within the control of the local authorities. It authorizes them, in their discretion, not merely to construct them or not where they do not now exist, but to remove or dispense with them where they do exist, if in their judgment it is desirable.

It is to be considered, if this is so, whether the order to remove the sidewalk here in question has been passed by the proper authority. That the aldermen had formerly the powers of surveyors of highways appears by the St. of 1854, c. 448, § 41. Under the St. of 1885, c. 266, § 6, the executive power of the city government is vested in the mayor, "to be exercised through the several officers and boards of the city in their respective departments, under his general supervision and control;" and the contention of the informant is, that the power to dispense with or remove the sidewalk is "executive" or "administrative" strictly, both these words being used in the statute. But the power to determine whether public convenience requires the construction of a sidewalk, and equally so its removal, involves the exercise of judgment not administrative only, and the exercise of the power is judicial in its character, although expressed in a legislative form. The power so to repair a highway that it shall be fit for travel within the lines marked out for travel as established, is executive; but that of determining what shall be the lines of travel is legislative. The board of aldermen may not be able to control executive action of the mayor by prescribing the time within which the removal shall take place; but this portion of the order may fairly be interpreted as imposing upon the proper officer, the superintendent of streets, acting under his official superior, the mayor, the duty of doing it within the time

named, if it can be so done with proper regard to other executive duties of a similar character.

The remaining question is whether the board of aldermen might pass such an order without a more specific appropriation than the general appropriation for paving, made at the beginning of the year, before action had been had or taken as to this sidewalk, to which appropriation the order directed the expenditure to be charged. The St. of 1885, c. 266, § 6, provides that "no expenditure shall be made nor liability incurred for any purpose beyond the appropriation duly made therefor." An appropriation had been made for the paving department of \$800,000, for the objects and purposes explained in the recommendations of the committee on paving. These included new work on streets already laid out, and on those which might be petitioned for, and for repairs and maintenance of streets and roads. If the removal of the sidewalk and also the repaving of that portion of the street were necessary, they were acts in the nature of a repair of the way. The appropriation, as passed, contemplated contingencies, the exact nature and character of which could not be foreseen; and when such a contingency occurred, the expenditure which became necessary might properly be assigned to it. It is not suggested that the appropriation did not afford ample means to meet the expenditure, but only that there was no more than sufficient money on hand "to do the customary and necessary work in other respects of the department of paving." If it shall be found hereafter that the appropriation is exhausted before the work in question can properly be done, the statutory provision forbidding expenditure beyond the appropriation must be observed, but the order for this work is not, on that account, invalid.

*Petition dismissed.*

HENRY J. WEIL *vs.* GEORGE J. RAYMOND & others.

Suffolk. March 18, 19. — July 1, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

A bill in equity, against A., B. his wife, and C., alleged that the plaintiff sold goods and lent money from time to time to A., who occupied a store and gave the plaintiff to understand that he was doing business there on his own account under the name of A. and Company; that, on a day named, A. owed the plaintiff a certain sum, being the amount of an open account and of certain promissory notes; that afterwards all the goods in the store formerly occupied by A. were removed to another store, where they were attached on a writ in an action brought by the plaintiff against A. to recover the amount of said debt, and a keeper was placed therein; that, on the same day, B. brought an action against the plaintiff, and, at A.'s instigation, a keeper was placed in the plaintiff's store; that C. thereupon claimed to be the absolute owner of said stock of goods attached by the plaintiff, notified the officer who served the plaintiff's writ against A. to withdraw the keeper, and threatened suit if the plaintiff caused any goods to be removed from the store under his attachment, and the plaintiff then withdrew his keeper therefrom; that, at a date during the time of the sales and loans by the plaintiff to A., B. filed, by A.'s procurement, a certificate in the city clerk's office, stating that she proposed to do business on her separate account under the firm name of A. and Company, at the store then occupied by A.; that the plaintiff was not informed of the filing of such certificate until after he had brought suit against A.; that the plaintiff was ignorant as to the title under which C. claimed to own said goods, but the plaintiff was told by C., just before the attachment of the goods by the plaintiff, that the whole amount of C.'s claim against the goods did not exceed a certain sum; that the value of the goods above said sum was more than sufficient to satisfy the claim of the plaintiff, who had often been assured by A. that C. held ample security other than said goods for all, or nearly all, of any debt due by A. to C.; and that A. held a lease of certain real estate, which included the store so occupied by him, for a term of years, "which lease is unassignable by the lessee without the written consent of the lessor, and is terminable at the election of said lessor, if said lessee shall be declared insolvent, or any assignment of his property shall be made for the benefit of his creditors." The prayer of the bill was for an account, for an injunction, and for general relief. *Held*, on demurrer, that the bill could not be maintained.

BILL IN EQUITY, filed July 8, 1885, against George J. Raymond, Hattie D. Raymond, his wife, Horace Partridge, Benjamin F. Hunt, Frank P. Partridge, and Adolph Erlebach, the four last-named persons being copartners under the firm name of Horace Partridge and Company, alleging the following facts:

The plaintiff does business in Boston, and, before December 4, 1883, sold merchandise and lent money from time to time to George J. Raymond, who gave the plaintiff to understand that

he was carrying on business in Boston, on his sole account, under the name and style of George J. Raymond and Company, and who occupied a large store in the conduct of said business at No. 5 Tremont Row in said Boston. In like manner, since December 4, 1883, the plaintiff has continued to sell goods, to be disposed of in the prosecution of said business at No. 5 Tremont Row, and to make loans to George J. Raymond upon the credit and obligation of George J. Raymond and Company, believing, and being led by said George J. Raymond to believe, that he was thereby lending money and selling goods to, and receiving the obligation of, said George J. Raymond. On September 15, 1884, the debt due to the plaintiff was represented by an open merchandise account overdue, amounting to \$518.83, and three promissory notes of \$1000 each, due, respectively, on the fourteenth day of September, of October, and of November, 1884.

On said September 15, 1884, George J. Raymond applied to the plaintiff for an extension of said note, then overdue, which the plaintiff refused to grant, and said Raymond thereupon gave to the plaintiff a check for the amount thereof, namely, \$1000, upon the Merchants' National Bank of Boston, dated September 20, and signed George J. Raymond and Company. Raymond, on the morning when said check became due and payable, and prior to the presentation thereof in due course of business, went to said bank and closed the account of George J. Raymond and Company with the same, and drew therefrom all money then and there deposited in the name of George J. Raymond and Company, whereby, and by failure to provide a sufficient deposit in said bank, said check when presented was dishonored and wholly unpaid.

On said September 15, or thereafter, but before September 20, all the stock of goods formerly in said store No. 5 Tremont Row was removed to a certain store numbered 50 in Winter Street in said Boston. On September 23, the plaintiff, on a writ sued out by him against George J. Raymond for the collection of said merchandise account and check, attached the goods contained in said store No. 50 Winter Street, and put a keeper therein to satisfy any judgment which the plaintiff might recover in said suit; and immediately afterwards, on the same day, the plaintiff was sued in an action denominated contract or tort



by Hattie D. Raymond, wife of said George J. Raymond, and a keeper was placed in the plaintiff's store in said suit, at the instigation of George J. Raymond. On the same day, the officer serving the plaintiff's said writ against said Raymond was served with notice by the firm of Horace Partridge and Company to withdraw the keeper from the store numbered 50 Winter Street, and afterwards, on September 26, was notified in writing by Horace Partridge and Company that said firm claimed to be absolute owners of the contents of said store, and suits for damages were threatened by an ostensible agent of said firm, if the plaintiff caused any goods to be removed from said store under said attachment thereof. Thereupon the plaintiff withdrew his keeper therefrom, and since that time Horace Partridge and Company have made demand on the plaintiff for damages to them caused by said attachment.

On December 4, 1883, Hattie D. Raymond filed, or caused to be filed, a certain paper or certificate in the city clerk's office in Boston, stating that she proposed to do business on her separate account under the firm name of George J. Raymond and Company at Nos. 5 to 8 Tremont Row in Boston. The plaintiff was not informed of the filing of any such certificate until after the bringing of said suit by him against George J. Raymond, and he is ignorant of any circumstances of the making and filing of said certificate, and of any facts whereby the business at that time carried on in said store No. 5 Tremont Row, and the goods then and thereafter therein contained and removed to said store numbered 50 Winter Street, were transferred to Hattie D. Raymond. The plaintiff believes that said certificate was filed by the procurement of said George J. Raymond, and is a fraudulent evasion of the provisions and purposes of the statutes of the Commonwealth, in that the adoption of the name and style under which said George J. Raymond ostensibly theretofore carried on business was calculated to prevent any inquiry, and did prevent any inquiry, on the part of the plaintiff, in regard to any change in said business to be effected thereby, and was calculated to and did afford said George J. Raymond a means for continuing to obtain goods, loans, and credits from the plaintiff without notice to the plaintiff that said Hattie D. Raymond was or pretended to be the principal carrying on said business. George J.

Raymond filed said certificate, or caused or procured it to be filed, for the fraudulent purpose of enabling him to obtain goods and credits from the plaintiff, who should, nevertheless, be led into or left in the belief that he was trusting said George J. Raymond; and for the purpose of substituting, in the place of a liability on the part of said George J. Raymond, liability on the part of said Hattie D. Raymond, who was otherwise unknown in business and without commercial credit; and also with the intent on said George J. Raymond's part of effecting a fraudulent conveyance, or the substantial and practical equivalent of a fraudulent conveyance, of all the property and stock of goods pertaining to the business in respect to which said certificate purported to be filed, and of goods and loans which said Raymond might afterwards obtain in the name or on the credit of George J. Raymond and Company, to said Hattie D. Raymond, either immediately by virtue of the filing of the said certificate, or immediately by enabling him as the pretended agent of said Hattie D. Raymond, or said Hattie D. herself, as the pretended principal in said business, to retain or dispose of said property, or any proceeds thereof, all on a secret trust for the benefit of said George J. Raymond, or to cover and protect said property from attachment as the property of said George J. Raymond, or from otherwise responding to any liability on his part, or for all said purposes, and with the intent to defeat, delay, and defraud the creditors of said George J. Raymond. Hattie D. Raymond knew of, or had reason to know of, all said fraudulent purposes of George J. Raymond, and consciously participated in the endeavors herein mentioned to effect the same.

The plaintiff is ignorant as to the nature of the title, if any, under which Horace Partridge and Company claimed to own the goods in said store No. 50 Winter Street; but the plaintiff was told by a member of said firm, just prior to the attachment of said goods by the plaintiff, that the whole amount of all title and claim of said firm in and to or against said goods was between \$500 and \$800, and did not exceed said last-named sum. The value of said goods above said sum of \$800 was more than sufficient to satisfy the plaintiff's claim, and the plaintiff has often been assured by George J. Raymond that Horace Partridge and Company held ample security other than said

goods for all, or nearly all, of any indebtedness due by said Raymond to Horace Partridge and Company. All title, if any, which Horace Partridge and Company had in or to the greater part of said goods in said store No. 50 Winter Street, was conditional, and not absolute, and was derived and received by said firm from said Hattie D. Raymond, acting under color and in pursuance of a title and authority which she pretended was vested in her by the filing of said certificate, and Horace Partridge and Company were informed of these facts.

On or about March 4, 1884, said George J. Raymond leased from one Robert Codman certain valuable real estate in said Boston, the same being the stores and buildings numbered from 5 to 8 inclusive in Tremont Row, for a term of ten years, which lease is unassignable by the lessee without the written consent of the said lessor, and is terminable at the election of said lessor, if said lessee shall be declared insolvent, or any assignment of his property shall be made for the benefit of his creditors. The property and interest thereby acquired by said George J. Raymond is very valuable; but the plaintiff is advised that, because of the non-assignability of the same, said leasehold estate cannot be effectively attached and sold on execution, or taken by an assignee of said Raymond in insolvency, and that the net profit and income thereof can only be come at, in satisfaction of the indebtedness of said Raymond, by a receiver thereof, to be appointed by this court.

Inasmuch as the plaintiff is advised that said George J. Raymond and his said wife cannot do business as copartners, and cannot be held jointly liable in the premises, and that, if said certificate was filed or procured to be filed for the fraudulent purposes hereinbefore mentioned, and said Hattie D. Raymond consciously participated therein, the plaintiff has a right to hold either or both of said parties, because of said fraud, as primarily liable to him on the indebtedness incurred in the name of George J. Raymond and Company to the plaintiff, as he shall ascertain in this proceeding to be most advantageous to him in that respect.

Should such participation appear, though Horace Partridge and Company be innocent of all knowledge of or participation in said fraudulent purposes, all goods, effects, or credits which

they may have in their possession of said Hattie D. Raymond, as well as of said George J. Raymond, may be applied in satisfaction of the plaintiff's said claim. If Horace Partridge and Company, in acquiring such goods, effects, or credits, consciously aided or participated in said fraudulent proceedings or purposes of said George J. Raymond, they are chargeable for the payment of the plaintiff's said claim to the full value thereof, whether acquired or received by them from said George J. Raymond and Hattie D. Raymond, or either of them, and whether they have paid for or on account of the same or not. If said Hattie D. Raymond was innocent of all knowledge of or participation in said fraudulent purposes, but received any goods or other property which had been sold, lent, or entrusted to her husband by the plaintiff, or other persons, in ignorance of her connection with said business, then no title thereto passed to her, and the proceeds thereof in her hands, or any indebtedness on the part of Horace Partridge and Company to her for the same, or a proportional part of said proceeds or of said indebtedness, if such goods or loans were mingled with other property to which she may have had a good title, to be herein ascertained, are all applicable to and chargeable for the payment of the plaintiff's said claim.

The plaintiff is further advised, that no attachment of any goods, effects, or credits purchased in or standing in the name of said George J. Raymond and Company can be made without great uncertainty and danger of liability, and the rights of the plaintiff in the premises may not be determined at law without many and expensive suits, and said leasehold estate of said George J. Raymond cannot be effectively attached under process of attachment, and the plaintiff is without a plain, adequate, and complete remedy at law.

The prayer of the bill was, that an account of the indebtedness of said George J. Raymond and Company to the plaintiff might be taken, and all parties liable to the plaintiff on account thereof, or to respond thereto, might be ascertained and charged therewith; that an account of the transactions between said George J. Raymond and Hattie D. Raymond, and of either of them with Horace Partridge and Company, whereby the nature and liability on account thereof might be ascertained, and it

goods for all, or nearly all, of any indebtedness of Raymond to Horace Partridge and Company. All which Horace Partridge and Company had in or to part of said goods in said store No. 50 Winter Street, and was derived and received from said Hattie D. Raymond, acting under pursuance of a title and authority which she invested in her by the filing of said certificate, and Partridge and Company were informed of these facts.

On or about March 4, 1884, said George J. Raymond from one Robert Codman certain valuable real estate in Boston, the same being the stores and buildings 5 to 8 inclusive in Tremont Row, for a term of ten years, the lease is unassignable by the lessee without the consent of the said lessor, and is terminable at the election of the said lessor, if said lessee shall be declared insolvent, or if his property shall be made for the benefit of his creditors. His property and interest thereby acquired by said Raymond is very valuable; but the plaintiff is advised of the non-assignability of the same, said lease cannot be effectively attached and sold on execution, and the assignee of said Raymond in insolvency, and the income thereof can only be come at, in case of the indebtedness of said Raymond, by a receiver appointed by this court.

Inasmuch as the plaintiff is advised that said Raymond and his said wife cannot do business, and cannot be held jointly liable in the premises, the certificate was filed or procured to be filed for the purposes hereinbefore mentioned, and neither of them consciously participated therein. The plaintiff is either or both of said parties liable to him on the said lease. George J. Raymond cannot ascertain in this case, and the plaintiff in that respect.

Should such  
and Company  
in said fraud

they may have in the [redacted] as well as of said [redacted] faction of the [redacted] Company. In [redacted] aided or [redacted] of said George [redacted] of the plaintiff [redacted] acquired or [redacted] Hattie D. Raymond [redacted] paid for or on [redacted] Raymond was [redacted] said fraudulent [redacted] erty which had [redacted] the plaintiff, or [redacted] with said business [redacted] proceeds thereof [redacted] of Horace Partridge [redacted] proportional part of [redacted] such goods or lease [redacted] she may have had a [redacted] applicable to and [redacted] said claim.

The plaintiff is [redacted] goods, effects, or [redacted] said George J. F. [redacted] great uncertainty [redacted] plaintiff in the [redacted] many and [redacted] George J. R.

es not set out a copy of the lease te that it "is unassignable by the ent of the said lessor, and is ter- said lessor if said lessee shall be gument of his property shall be litors." An assignment by opera- covenant not to assign; *Smith v.* n inspecting a copy of the lease, it is, the interest of the lessee ceases execution, this is the effect of the for equity jurisdiction. There is, orge J. Raymond has sublet the of any rent therefrom.

r a debt for merchandise sold, and d to a judgment, and therefore the equity powers of the court to sub- execution at common law cannot be a judgment obtained at law.

plaintiff seeks to have applied to the property which, from its nature, can be taken on execution in a suit at law; and the case stated is not within 11. The case discloses no equity against Raymond or his wife in the [redacted] law.

merchandise to George J. Raymond and George J. Raymond and George J. Raymond to his wife [redacted] the property, George J. Raymond. See *Clark* of his wife, an undivided [redacted] *Decree affirmed.*

er; he cannot sue [redacted] ed against each [redacted] both, for a judgment [redacted] is a bar to an action [redacted] *Wright v. Wright*, 2 [redacted] *Wright v. Wright*, 2 [redacted] *Wright v. Wright*, 2 [redacted] C. 977.

is not so [redacted] before [redacted]

might be ascertained if Horace Partridge and Company have any goods, effects, and credits of either said George J. Raymond or Hattie D. Raymond in their hands or possession, and, if so, to what extent, and that the same might be applied to the satisfaction of any claim the plaintiff might establish in this case; that meantime a receiver might be appointed to take charge of all and singular said leasehold estate of said George J. Raymond, to collect the rents and profits thereof, and out of the same to pay the charges thereof and the remaining net proceeds into this court, to be applied in satisfaction of any judgment which the plaintiff might obtain; that Horace Partridge and Company might be enjoined from disposing of any goods, effects, or credits in their hands belonging to said George J. Raymond and Hattie D. Raymond, or either of them, or in which they or either of them have any interest, or received from them or either of them, and from paying or accounting for said goods to said George J. Raymond or Hattie D. Raymond, or either of them, and said George J. Raymond from making any assignments of the rents or income to be derived from the subletting of said leasehold estate, and said Hattie D. Raymond from making any disposition of any assets in her possession or control, acquired in the name of George J. Raymond and Company; and for other and further relief.

The defendants demurred to the bill, assigning several grounds therefor, which appear in the opinion.

At the hearing, the demurrer was sustained, and the bill dismissed, with costs; and the plaintiff appealed to the full court.

*J. C. Coombs, (F. Burke with him,)* for the plaintiff.

*R. Lund & W. C. Cogswell,* for the defendants.

FIELD, J. If George J. Raymond has any interest in the leasehold estate, which can be taken by a creditor in satisfaction of his debt, it is a legal estate which can be attached in an action at law against him, and, if judgment is obtained, execution may be levied upon it. Pub. Sts. c. 171, § 51; c. 161, §§ 61 & seq. *McNeil v. Ames*, 120 Mass. 481. As was said in *Schlesinger v. Sherman*, 127 Mass. 206, this is the "entire remedy which the Legislature intended to give for applying to the payment of debts any title in real estate, or in the rents and profits thereof, which is a legal interest of such a nature as to be capable of being taken on

execution at law." The bill does not set out a copy of the lease or its terms, further than to state that it "is unassignable by the lessee without the written consent of the said lessor, and is terminable at the election of the said lessor if said lessee shall be declared insolvent, or any assignment of his property shall be made for the benefit of his creditors." An assignment by operation of law is not a breach of a covenant not to assign; *Smith v. Putnam*, 8 Pick. 221; and if, on inspecting a copy of the lease, it should appear that, by its terms, the interest of the lessee ceases if it be attached or taken on execution, this is the effect of the contract, and is not a ground for equity jurisdiction. There is, indeed, no averment that George J. Raymond has sublet the property, or is in the receipt of any rent therefrom.

The plaintiff sues to recover a debt for merchandise sold, and this debt has not been reduced to a judgment, and therefore the case is not within the general equity powers of the court to subject property on which an execution at common law cannot be levied to the satisfaction of a judgment obtained at law. *Carver v. Peck*, 131 Mass. 291.

The chattels which the plaintiff seeks to have applied to the payment of his debt are property which, from its nature, can be come at to be attached and taken on execution in a suit at law, if the property of the debtor; and the case stated is not within the Pub. Sts. c. 151, § 1, cl. 11. The case discloses no equitable interest of either George J. Raymond or his wife in the chattels, which cannot be attached at law.

If the plaintiff sold the merchandise to George J. Raymond under the name of George J. Raymond and Company, he can sue him therefor; if, in buying the property, George J. Raymond acted as the agent of his wife, an undisclosed principal, the plaintiff can also sue her; he cannot sue both jointly, but it is said that he can proceed against each separately, although not to judgment against both, for a judgment obtained against one, although unsatisfied, is a bar to an action against the other. *Raymond v. Crown & Eagle Mills*, 2 Met. 319. *Kingsley v. Davis*, 104 Mass. 178. *Curtis v. Williamson*, L. R. 10 Q. B. 57. *Priestly v. Fernie*, 3 H. & C. 977.

The plaintiff's difficulty is not so much in determining whom to sue, as in determining beforehand who owns the chattels



which he wishes to attach in the suit; but the statutes have not made this a ground of jurisdiction in equity. If the chattels have been mortgaged or pledged to Horace Partridge and Company by the plaintiff's debtor, or if Horace Partridge and Company have a lien upon them, and the general property is in the plaintiff's debtor, they can be attached in an action at law. Pub. Sts. c. 161, §§ 74 *et seq.*

The plaintiff contends that the certificate of Hattie D. Raymond, that she proposes to do business on her separate account under the style of George J. Raymond and Company, was filed by her in fraud of the statute and of his rights. The Legislature has not forbidden a married woman from doing business under a firm name which contains the name of her husband, and under which he had previously done business. If the certificate is not such as the Pub. Sts. c. 147, § 11, require, the effect is that the property employed in the business is liable to be attached as the property of the husband, and he is liable upon all contracts lawfully made in the prosecution of the business. The deceit practised under such a certificate is not greater than if any man or unmarried woman had taken the business of George J. Raymond carried on by him under the name of George J. Raymond and Company, and had continued to carry on the same kind of business under the same name, at the same place, with George J. Raymond as agent. If George J. Raymond has attempted to convey his property directly to his wife, the conveyance is void, and it can still be attached as his property; if the conveyance has been made through a third person, whether it is fraudulent and void as against his creditors is to be determined upon much the same principles as if the conveyance had been made to any other person. If the change in the form of doing business is a pretence, and George J. Raymond is in fact carrying on the business, the filing of the certificate does not prevent the plaintiff from proving what the fact really is. It is only on the ground that the property of the plaintiff's debtor has been conveyed in fraud of creditors, that the plaintiff can bring his case within the Pub. Sts. c. 151, § 8. This section gives jurisdiction in equity, in the cases specified in it, concurrently with that of courts of law. *Powers v. Raymond*, 137 Mass. 483. The plaintiff before filing this bill brought an action at law

in the courts of this Commonwealth against George J. Raymond for the same cause of action as that alleged against him in this bill, and this action, apparently, is now pending; and it may be that the pendency of this action would be a good ground for dismissing the bill as to him. See *Buffum v. Tilton*, 17 Pick. 510.

If the bill had been brought against Hattie D. Raymond as the sole debtor of the plaintiff, with an allegation that she had transferred her property to Horace Partridge and Company to defraud her creditors, it may be that it would state a case within the Pub. Sts. c. 151, § 3, and that the pendency of the action against George J. Raymond would not be a bar to this suit against her, as the undisclosed principal for whom he contracted the debt. But the plaintiff cannot, upon the facts shown, maintain a suit against both jointly as his debtors, either at law or in equity. In bringing or in prosecuting a suit, he must elect whether he will take George J. Raymond or his wife as his debtor, and he cannot make both principal defendants in one suit, whether he charges them conjunctively or alternatively. The uncertainty, if there be any, as to the person liable for the indebtedness, and the risk attending an attachment of the property and a levy of execution upon it, if the plaintiff obtain judgment against either George J. Raymond or his wife, does not give the court jurisdiction in equity. But the bill does not distinctly allege that the property has been conveyed to Horace Partridge and Company by either George J. Raymond or his wife in fraud of the creditors of either. Indeed, the bill does not distinctly and unequivocally allege that the property has been conveyed by George J. Raymond to his wife with intent to defeat, delay, or defraud his creditors. See *Clark v. Jones*, 5 Allen, 379.

*Decree affirmed.*

SARAH H. KENT & another vs. JOSIAH F. DUNHAM  
& others.

Suffolk. March 23. — July 1, 1886. W. ALLEN & HOLMES, JJ., absent.

A devise in a will of certain property of the testator to two persons named, "their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust, to sell, dispose of, invest, and manage the same, and appropriate such part of the principal and interest as they may deem best, for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid," cannot be upheld as a public charity, and is invalid.

BILL IN EQUITY, by two heirs at law of Josiah Dunham, who died on April 28, 1857, to have a certain trust created by the residuary clause of his will declared void. The defendants demurred to the bill, for want of equity. Hearing, on bill and demurrer, before *C. Allen, J.*, who reserved the case, which appears in the opinion, for the consideration of the full court.

*C. H. Hill & L. S. Dabney*, for the defendants.

*R. M. Morse, Jr. & H. Dunham*, for the plaintiffs.

DEVENS, J. The gift in the residuary clause of the will to "Samuel Leeds and Josiah Dunham, Jr., their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust, to sell, dispose of, invest, and manage the same, and appropriate such part of the principal and interest as they may deem best, for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid," will not admit of being construed as a gift to the testator's children and their descendants who might be living at the time of the testator's decease, or that of the last of his children. The language used, as well as the declared purpose, shows that it is a gift in trust for the benefit of those descendants of the testator who should thereafter, through an indefinite period of time, become destitute and in need of aid and support. The words import that the bequest is ultimately to be administered by others than the trustees named, and that the testator has not sought to repose a special confidence in them exclusively, but to establish a permanent trust for which trustees are ultimately to be appointed according to the ordinary rules of courts of equity. That such

a gift is too remote, as tending to create a perpetuity when it is to be held for the benefit of those who may not have been living at the time of the testator's death, or that of his children, and who may not come into being until many years thereafter, cannot be controverted, unless it can be sustained as a public charity. *Nightingale v. Burrell*, 15 Pick. 104. *Brattle Square Church v. Grant*, 3 Gray, 142. *Sears v. Russell*, 8 Gray, 86. *Thorndike v. Loring*, 15 Gray, 391. The Attorney General has therefore been made a party to this bill, as well as all the descendants of the testator. *Jackson v. Phillips*, 14 Allen, 539.

A public or charitable trust may be indefinite in duration, and, its general object or purpose, as indicated, being charitable, the application and selection of the particular objects or individuals who are to receive its benefits may be confided to those who are its trustees. That a gift should have this character, there must be some benefit to be conferred upon, or duty to be performed towards, either the public at large, or some part thereof, or an indefinite class of persons. If a trust were created for the benefit of the poor of a particular town or parish, or of persons of a specified class or occupation, as seamen, laborers, or mechanics, it would not be doubted that it would be good as a charity. So, if a sum were bequeathed, the income of which, from time to time, or in the discretion of the trustees, was to be applied to the relief of the destitute, by distribution of fuel or provisions, or in any other similar defined mode, or as the trustees might deem most expedient, the gift could be enforced as a public charity.

The gift in the case at bar is solely for the benefit of the children of the testator and their descendants. The only public interest there can be in connection with it is, that, whereas there may be hereafter certain destitute persons, descendants of the testator, who might otherwise become a public charge, they will be entitled to relief from this fund. This legacy, it will be observed, is readily distinguishable from one by which the income of a fund is devoted to the poor of a particular town or parish, preference being given to the descendants or the relations of the testator. In such a donation, there is a public object, as they are thus provided for only as a part of the poor who are to receive the benefit of the charity, although a preference

is given them, on account of their descent or relationship, in its distribution.

There are certain English cases, which, as the trustees contend, afford strong ground for holding this legacy to be a public charity. In *Attorney General v. Bucknall*, 2 Atk. 328, decided in 1741, the point decided was, that any person, though the most remote in the contemplation of the charity, might be a relator in an information in reference thereto. The facts, as stated in the case, do not show that any question arose as to whether the bequest was a public charity, the only inquiry apparently being whether the relator was one of the poor relations who were the objects of the bounty. In *White v. White*, 7 Ves. 423, decided in 1802, it was held that a bequest to poor relations of two families for putting out their children as apprentices, the duration of which would have exceeded the limits allowed by law, unless it was a public charity, might be executed by putting out those who were then ready as apprentices. There was no discussion of the subject in the opinion of the Master of the Rolls, Sir William Grant. In *Attorney General v. Price*, 17 Ves. 371, decided in 1810, there was a direction to pay 20*l.* per annum to the testator's poor kinsmen in the county of Brecon, which was held good as a charity, apparently upon the authority of *Isaac v. De Friez*, Amb. 595, and on the ground that it was entitled to have perpetual continuance for the benefit of a particular class of poor. In *Gillam v. Taylor*, L. R. 16 Eq. 581, it was held that, where the testator gave the residue of his real and personal estate to trustees for investment in their joint names, and directed the interest from time to time to be paid to such lineal descendants of a person named, "as they might severally need," the gift was charitable; and that it need not be distributed to those actually poor, but only to those relatively so; and thus that, if all the descendants except one had 20,000*l.* a year, and the latter 10,000*l.* a year, he would be entitled. This decision is treated with but scant respect in *Attorney General v. Northumberland*, 7 Ch. D. 745, by Sir George Jessel, M. R., where it is said that such a charity could only be good in favor of those actually poor. In this last case, the gift gave only a preference to the kindred of the testator in the distribution of the income of the trust fund to the poor, which was provided for annually.

These cases do not fully sustain the position that the legacy here in question can be upheld as a public charity. In all of them, there were persons so situated as to be entitled to the benefit of the charity, so that an indefinite accumulation was not to be permitted in favor of a class which might never have an existence, or might not come into existence within any period of time when its connection with the testator could be traced.

Bequests in favor of poor relations also are for a far more extensive class than descendants. While the failure of issue, and thus the termination of the line of lineal descent, is comparatively common, the ancestors of every person are indefinitely numerous, and there can be no failure of collateral relations except such as may arise from the impossibility of tracing the descent of the testator.

Without desiring to express any opinion as to whether we should hold it to be our duty to follow the doctrine of these cases, if the question presented by the case at bar were fairly within them, the reasons why the gift of the testator cannot be sustained as a public charity appear to us entirely sufficient.

It is the policy of the law to prevent indefinite accumulations of property for the benefit of individuals. The descendants of the testator are now, and have been since his decease, in comfortable circumstances. Not only may a long time elapse before any descendant will exist who can be termed a "destitute" person, but such a time may practically never occur, as it may be at so distant a period that descent cannot be traced, or the event of the failure of descent from the testator may render it impossible that it should ever occur. In the expectation of the remote contingency that there shall be a descendant who is a destitute person, the fund is to be permitted to accumulate, if the will of the testator is followed. If the line of descent from the testator fails, it will have been accumulated for his heirs, it may be in a remote generation. There is no general public object sufficient to justify this accumulation, in the possible advantage which the public may obtain by having the descendants of the testator protected from beggary, and thus from becoming a public charge. To establish, as a permanent charity, a provision for a single family, and thus, it may be,

to permit an indefinite accumulation of property, which might eventually be solely for the benefit of the testator's heirs, and those who may claim under them, would be foreign to the general principles of our law on this subject, and cannot be justified by so slight a prospective public benefit.

The result is, that the portion of the residuary clause of the testator's will, which seeks to establish a trust in two thirds of the residue of his estate for the benefit of his children and their descendants "who may be destitute, and in the opinion of said trustees need such aid," must be decreed to be invalid and without effect.

*Demurrer overruled.*



**JAMES TANSEY & others vs. PATRICK McDONNELL  
& others.**

Suffolk. March 24. — July 1, 1886. W. ALLEN & HOLMES, JJ., absent.

**QUINCY SAVINGS BANK & others vs. JAMES TANSEY  
& others.**

Norfolk. March 24. — July 1, 1886. W. ALLEN & HOLMES, JJ., absent.

A bill in equity was brought in one county to have a sale of real estate by an executor declared void. Subsequently, the defendant in the first case brought a bill in equity, in another county, against the plaintiff in the first case, to confirm the same sale. The second bill did not refer to the first, and the answer to the second bill pleaded the pendency of the first bill. The facts as they appeared from the bill and answer in the first case were not identical with the facts as they appeared from the bill and answer in the second case. *Held*, that, even if the second bill could be treated as a cross bill, the two cases could not be reserved together for the consideration of the full court upon the bills and answers.

THE FIRST CASE was a bill in equity, brought in Suffolk county, to have a sale made by an executor declared void.

THE SECOND CASE was a bill in equity, brought in Norfolk county, by the defendants in the first case against the plaintiffs in that case, to confirm the same sale.

The cases were heard together, by *Gardner, J.*, who reserved them for the consideration of the full court. The reservation in

the first case was as follows: "Reserved on bill and answers and cross bill and answers for the consideration of the whole court;" and in the second, as follows: "Reserved with bill in equity in Suffolk." The facts material to the point decided appear in the opinion.

*F. Cunningham, (E. N. Hill with him,)* for the plaintiffs in the first case, and for the defendants in the second.

*J. L. Eldridge, contra.*

FIELD, J. We are of opinion that these suits cannot properly be determined upon these reservations. It may be that the second bill should be dismissed, if the first is considered on its merits, but we are not now required to decide this. The pendency of the first suit has been pleaded in the answer to the second bill, in accordance with Chancery Rule 13, 136 Mass. 605. A plea is usually set down for argument, and is allowed or overruled, and, if overruled, the defendant must answer; if allowed, the plaintiff may traverse the plea, although it has been said that there is a different practice when the plea is of another suit for the same matter pending in equity. Story Eq. Pl. §§ 743, 744. But a plea may be ordered to stand for an answer; and under our practice a plea, if inserted in an answer, must be taken to be a part of it, and true for all the purposes of the case, if the cause is set down by the plaintiff for hearing upon bill and answer. The two causes have been reserved together, each upon bill and answer, apparently under a misapprehension that the second bill can be considered as a cross bill, and that all the allegations of the same parties in both suits can be taken together, for the purpose of ascertaining what are the facts which the pleadings disclose. The two suits are between the same persons, and relate to the same subject matter and the same controversy; but in the second suit the parties to the first are reversed, and the second suit is pending in the county of Norfolk, while the first is pending in the county of Suffolk. Whether a cross bill can be filed in another county than that in which the original bill is pending, may well be doubted. See Story Eq. Pl. § 400. Adams Eq. 402 *§ seq.* The second bill is certainly not a cross bill in form; it does not recite the proceedings in the first bill, or refer to that bill, and perhaps it may be said that the second bill is not in substance strictly a cross



bill, although in the nature of a cross bill, but it is not necessary now to decide this. In a hearing on bill and answer, all facts well alleged in the answer must be taken to be true; and, under our rules, (Chancery Rule 28, 136 Mass. 608,) "All facts well alleged in the bill, other than for discovery only, which are not denied or put in issue by the answer, shall be deemed to be admitted." In hearing these two causes together on bill and answer, whether the second bill is considered a cross bill or not, as neither bill refers to the other, each cause must be considered separately, and the answers in the first suit cannot be supplemented by the allegations contained in the second bill, nor can the first bill be supplemented by the allegations contained in the answer to the second. As the controversy is between the same parties upon the same subject matter, and for substantially the same purpose, namely, on the one side to avoid a sale of real property, and on the other side to confirm it, the causes ought to be determined upon the same facts. But the facts in the two suits, if determined upon bill and answer, are not the same.

As an illustration of the difference between the two suits upon the facts, if they are considered separately upon bill and answer, take the allegations in each suit respecting the notice given of the intended sale of the real property by John McDonnell, as executor of the will of William Tansey.

In the first bill, it is alleged "that, in pursuance of the said decrees of the Probate Court, the said John McDonnell, as executor and guardian as aforesaid, proceeded to sell the said lands and buildings hereinbefore described, and gave notice of his intention so to do as required by the statute of the Commonwealth in that behalf made and provided; but the plaintiffs aver that said notice was not good and sufficient in law and in accordance with said statute, in that it did not contain a specification of the place where such sale was to take place, or any other specification from which such place could be ascertained or known."

In answer to this, four of the defendants "deny that said notice was not good and sufficient in law, and in accordance with the statute, but defective, and the sale thereafter made void and of no effect; to the contrary, they say that said notice and said

sale were good, sufficient, and valid." The Quincy Savings Bank, the fifth defendant, "for answer says that it is ignorant as to the various paragraphs and allegations of the plaintiffs' bill, and can neither admit nor deny the same, except so far as they relate to said mortgage dated the third day of December, 1883," which was a transaction long subsequent to the sale by the executor. This last answer must be taken to put in issue, within the meaning of Rule 28, the allegations of the bill which have been before recited; and, on hearing this cause on bill and answers, the fact cannot be taken against the Quincy Savings Bank to be as alleged in the bill. It is not clear that the allegations in the first answer mentioned are sufficiently definite as averments of fact to enable the court to say, on bill and answer, that the notice did contain a specification of the place of sale, as required by the Gen. Sts. c. 102, § 15; but, as they stand, they could not be held to admit that the notice did not contain such a specification.

The second bill sets out in terms the notice of the sale given by McDonnell as executor; the defendants, in their answer, admit that this was the notice given; and it appears that there is in the notice no specification of the place of sale. This is regarded as a material fact by both parties.

If the question of actual notice to the Quincy Savings Bank of "any defect in the proceedings relating to the sale," &c. be material in the first suit, the fact must perhaps be taken to be that it had not notice, and in the second suit that it had. Apart from these and other differences in the facts of the two cases upon the pleadings as they stand, the allegations in the answer of the first four defendants in the first suit relating to the settlement of the probate accounts, and the acquiescence in and confirmation of the sale by the plaintiffs, are too indefinite to afford a sure ground for determining the rights of the parties.

The reservations should be discharged, and the causes stand for hearing upon the issues. *Ordered accordingly.*

GEORGE ELSEY & another *vs.* ODD FELLOWS' MUTUAL  
RELIEF ASSOCIATION & others.

Hampden. September 23, 1885. — July 3, 1886.

The Pub. Sts. c. 115, § 8, provide that a beneficiary association may, "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto, and such fund shall not be liable to attachment by trustee or other process." An association was organized under the statute "for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of deceased members or to their heirs." One of its by-laws provided that the benefit payable at the death of a member should be applied to the payment of the expenses of his last sickness and funeral, if not otherwise paid, and "the balance shall be paid to the person or persons designated by the member in his application for membership, or last legal assignment, provided such person or persons are heirs or members of the decedent's family." A member of this association, in his application for membership, designated his wife as the person to whom the benefit was to be paid upon his death. Afterwards he attempted to change the designation from his wife to his mother, who was not living with him, but who was living with her husband in another town and county. *Held*, that the attempted designation to the mother was invalid; that the original designation to the wife remained in force; and that she was entitled to the fund.

BILL IN EQUITY, by a member of the Odd Fellows' Mutual Relief Association, in behalf of himself and the other members, against the association, Henry S. Lee, its treasurer, Addie E. Wetmore, the wife of Davis L. Wetmore, a deceased member of the association, and Abigail C. Wetmore, the mother of said Davis, to restrain the payment of a certain fund to said Abigail. The bill was amended by discontinuing against said Addie E., and making her a party plaintiff. Hearing before *W. Allen, J.*, who dismissed the bill, with costs; and the plaintiffs appealed to the full court. The facts appear in the opinion.

*A. M. Copeland*, for the plaintiffs.

*E. H. Lathrop*, for the defendants.

MORTON, C. J. The first-named defendant is an association organized under the St. of 1874, c. 375. This statute was amended by the St. of 1877, c. 204, and the two statutes have been continued and reenacted in the Pub. Sts. c. 115.

Section 8, of the Pub. Sts. c. 115, provides that such an association may, "for the purpose of assisting the widows, orphans,

or other persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto, and such fund so held shall not be liable to attachment by trustee or other process." It authorizes an association of a peculiar character. Its object is to enable a man to lay aside a portion of his income or property, in the nature of an insurance upon his life, to be applied at his death to the use of his widow, orphans, or other persons dependent upon him. But the provisions of the general laws relating to life insurance companies do not apply to the association; the fund held by it is not attachable by the creditors of the member, and, by clear implication of the statute, after he has set it aside, he loses the absolute control over it which he has over his other property; he cannot assign it and divert it from the class of beneficiaries described in the statute, and direct its disposition to other persons outside of that class.

It was clearly the intention of the defendant corporation to conduct its business under the authority of this statute, though the agreement of association and the by-laws do not follow the exact words of the statute.

The corporation is formed "for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of deceased members or to their heirs;" and a by-law provides that the benefit payable on the death of a member shall be applied to the payment of the expenses of his last sickness and funeral, if not otherwise paid, and "the balance shall be paid to the person or persons designated by the member, in his application for membership, or last legal assignment, provided such person or persons are heirs or members of the decedent's family." But the by-law should be construed with reference to the statute, and, if practicable, such a meaning should be given to it as will make the two consistent, for it is not to be assumed that the by-law is intended to go beyond the scope of the statute, and thus violate its provisions.

The two descriptions of the class of beneficiaries, in the statute and in the by-law, would ordinarily include the same persons,

if the word "heirs" in the by-law is construed in its natural sense, as meaning those who, at the time of the designation, would be the heirs or distributees of the member. But if the word "heirs" is given a broader construction, and held to mean any one who may, under any circumstances, be or become an heir of the member, it would greatly enlarge his power to dispose of the fund, and enable him to assign it to persons not within the contemplation of the statute as beneficiaries.

Without deciding whether the word "heirs," as it applies only to personal estate, may not be held to mean distributees, we are of opinion that it is used in the by-law in its limited sense, to designate such persons as would be the legal heirs or distributees of the member at the time of his application or designation. This view is strengthened by the fact that, in the fourth clause of the same by-law, the same words are used in this sense, it being provided that, "if the designator leave no widow, or children, or assignee, then it shall be payable to his heirs."

In the case at bar, Davis L. Wetmore, in his application for membership, designated his wife, Addie E. Wetmore, as the person to whom the benefit was to be paid upon his death. At a later day, he attempted to change the designation from his wife to his mother, Abigail C. Wetmore. It is agreed that his mother was not living with him, but was living with her husband in another town and county. It is not suggested that she was dependent upon him. She was not one of those who would be his heirs, and she was not one of the "members of the decedent's family," within the meaning of the by-law. To give the word "family" the broad construction contended for by the defendants would make the by-law overreach the scope of the statute, and violate its spirit and purpose.

It follows, that the attempted designation to the mother of the deceased member was illegal and invalid, and we need not discuss the question whether it was sufficiently assented to by the directors of the defendant corporation.

As the assignment to the mother was invalid, we think the original designation to the wife remained in force. We can see no reason to suppose that the later assignment was intended to operate as a revocation of the designation to the wife, unless it took effect as a designation to the mother. The scheme of the

by-laws is, that the beneficiary shall be designated by the member in his application for membership, and the benefit shall be paid to such beneficiary, unless there is a subsequent legal assignment. They make no provision for revoking a designation, except by a legal assignment to some other person, assented to by the directors.

We cannot presume that the deceased member intended his assignment to operate as a revocation of the previous designation, in the event of its invalidity as an assignment to his mother, and there is no assent of the directors to any such revocation. We are therefore of opinion that the plaintiff Addie E. Wetmore is entitled to a decree that the fund in question shall be paid to her.

The plaintiff Elsey has no interest in the fund, and cannot maintain this bill; as to him the bill must be dismissed.\*

*Decree accordingly.*



WILLIAM E. FULLER, Judge of Probate, vs. MARY CONNELLY  
& others.

Bristol. Oct. 28, 1885. — July 2, 1886. FIELD & C. ALLEN, JJ., absent.

The settlement in the Probate Court of an administrator's account, showing that he has exhausted all the estate of his intestate in paying the expenses of the last sickness, funeral, and administration, is a good defence to an action brought against the administrator, upon his bond, although the administrator has suffered a judgment to be recovered against him before such settlement of his account.

MORTON, C. J. This is a suit upon an administration bond. The only breach alleged is that the plaintiff recovered judgment against the administratrix, which she refused to pay upon demand.

It is agreed that all the property left by the intestate has been expended by the administratrix in the payment of the necessary

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\* This point was not argued on either side, and is therefore not made the subject of a head note.

expenses of the last sickness, funeral, and administration ; and that the administratrix is to have the same benefit of those payments as if allowed by the Probate Court on an account duly filed by her since the date of the plaintiff's suit.

Our statutes provide that, "if it appears, upon the settlement of an account of an executor or administrator in the Probate Court, that the whole estate and effects which have come to his hands have been exhausted in paying the charges of administration and debts or claims entitled by law to a preference over the common creditors of the deceased, such settlement shall be a sufficient bar to any action brought against such executor or administrator by a creditor who is not entitled to such preference, although the estate has not been represented insolvent." Pub. Sts. c. 136, § 5.

If all the assets are exhausted in paying charges of administration and preferred claims, there is no occasion for setting in motion the machinery of insolvent proceedings ; and the purpose of the statute was to give to the settlement of an account showing this fact the same effect, so far as the rights of creditors are concerned, as a representation and adjudication of insolvency. It cannot be doubted that a settlement of such an account, or a representation of insolvency, before a creditor has obtained judgment in a suit, would be a defence to the suit. *Cushing v. Field*, 9 Met. 180. But the plaintiff contends that such defence is not open after a judgment is obtained ; that, by allowing such judgment to be rendered, the administratrix conclusively admits assets sufficient to pay the judgment ; and that the sureties in a suit upon the bond are bound by this admission. It may be assumed that a judgment against the administratrix is conclusive as to any defence which was or could have been pleaded in the action, except the defence of the special statute of limitations, which stands upon grounds peculiar to itself. *Robinson v. Hodge*, 117 Mass. 222, and cases cited. But the defence relied upon was not, and could not have been, pleaded in the original suit in this case. No account had been settled showing that all the assets were exhausted. The defendants do not now attempt to impeach the judgment, but they prove that, since the judgment was rendered, facts have occurred which show that there are no assets of the estate with which to pay it. Under our

system, where a creditor sues an administrator for a debt due from the estate, the question of the amount of assets is not ordinarily involved in the suit; and it is difficult to see why an administrator, who is defaulted in such a suit, should be held to admit assets so as to bind himself and his sureties personally, if the estate afterwards turns out to be insolvent.

A creditor may sue at any time after the expiration of a year from the filing of the bond, but an administrator is not obliged, at his peril, to ascertain within the year whether the estate is solvent. The amount of the property and of the debts may both or either be then unascertained and uncertain; and if, after the year has expired, he ascertains that the property is not sufficient to pay the debts, it is his duty to represent the estate insolvent. If, in the mean time, any creditor has obtained a judgment, he can prove the amount of it in the insolvency proceedings. By obtaining judgment, he does not obtain any priority over other creditors; and we can see no good reason why he should gain the right to call upon the administrator or his sureties to pay the judgment, although the estate is insolvent. The principal obligation of the bond is, that the administratrix shall faithfully administer all the assets which come to her hands; and we are of opinion that it is open to the sureties in this suit to show that she has applied all the assets to the payment of preferred charges and claims, by showing the settlement of an account under the statute. It seems to us that this conclusion is supported by reason and by the weight of the authorities.

There are two modes in which the personal liability of an administrator upon a judgment against him in his representative capacity can be established and enforced by the judgment creditor: by *scire facias* upon the judgment, and by a suit upon the bond.

The Pub. Sts. c. 166, § 10, provide that, "when an execution against an executor or administrator for a debt due from the estate of the deceased is returned unsatisfied, the creditor may upon a suggestion of waste sue out a *scire facias* against the executor or administrator. If the defendant does not appear and show sufficient cause to the contrary, he shall be deemed guilty of waste, and shall be personally liable for the amount thereof, when it can be ascertained, otherwise for the amount



due on the original judgment, with interest from the time when it was rendered."

This provision, in substance, has been in force since the St. of 1783, c. 32, § 9, was enacted. The policy has always been to make an executor or administrator liable *de bonis propriis* to a judgment creditor only upon the ground of waste. It may be that the burden is put upon the executor of proving that there has been no waste; but, if he can show this, it is the clear implication of the statute that he shall not be liable on *scire facias*. If, then, he can show that, since the judgment was rendered, there has been an adjudication of insolvency, or the settlement of an account showing that all the assets have been exhausted in paying preferred charges and claims, he shows that there has been no waste, and therefore that he is not liable for the judgment. It was held in the early and well-considered case of *Coleman v. Hall*, 12 Mass. 570, that, in *scire facias* on a judgment recovered against an administrator, it was a defence to show that, after the judgment, a representation and adjudication of the insolvency of the estate, was made.

This was approved in *Shillaber v. Wyman*, 15 Mass. 322, and extended to a case where the estate was represented insolvent after the *scire facias* was brought. It was also approved in *Walker v. Hill*, 17 Mass. 380.

The other remedy of a judgment creditor is by a suit upon the bond under the Pub. Sts. c. 143, § 10. This statute merely gives the judgment creditor the right to put the bond in suit for his own benefit, but does not define his rights, or the liability of the executor or his sureties. It cannot reasonably be contended that the liability of the executor or his sureties is greater in a suit upon the bond than it is in *scire facias* upon the judgment, and therefore the cases we have referred to are applicable to the case at bar, and show that the defence is maintained.

The case of *Newcomb v. Goss*, 1 Met. 333, is opposed to this view. It was there held, that a representation of insolvency, made after the suit upon the bond was commenced, was not a defence; and that the administrator and his sureties were personally liable for the full amount of the judgment, without regard to the question whether there was in fact any waste. It is noticeable that the cases which we have cited were not referred

to by the court or the counsel in the case of *Newcomo v. Goss*, but it is irreconcilable with those earlier decisions, which seem to us to be founded upon better reasons.

We must treat the case at bar as if the administratrix had duly settled an account in the Probate Court since this suit was commenced, showing that she had applied all the assets of the estate to the payment of charges of administration, funeral expenses, and preferred claims; and we are of opinion that, upon principle, and according to the decided weight of the authorities, such a settlement shows that there has been no waste; that the administratrix would not be personally liable on a *scire facias* upon the judgment; and that she and her sureties are not liable on the bond in suit.

*Judgment for the defendants.*

*H. K. Braley*, for the plaintiff.

*J. M. Morton*, for the defendants.



### JAMES O. SAFFORD & another vs. CHARLES A. WEARE.

Essex. Nov. 4, 1885. — July 2, 1886. FIELD & DEVENS, JJ., absent.

The demandant in a writ of entry claimed title to the premises by a deed, which was executed and delivered before, but was not recorded until after, an attachment of the premises in an action against his grantor. The tenant claimed title under a levy and sale on an execution issued upon the judgment in the action after the demandant's deed was recorded. The judgment was for a sum greater than the *ad damnum* in the writ. *Held*, that the judgment was erroneous, and could be avoided by the demandant; and that he was entitled to the premises.

W. ALLEN, J. This is a writ of entry. The demandants' title is by deed from one Jacobs, executed and delivered in 1878, and recorded in 1880. The tenant's bill is under a levy and sale on execution in 1881, in a suit against Jacobs, in which the premises were attached in 1879. The demandants held an unrecorded deed when the premises were attached as the property of their grantor, and had recorded their deed before judgment and execution. The question is whether the sale on the execution is valid against them.

The *ad damnum* in the writ against Jacobs was \$2000, and the judgment was for \$2117.14 damages, besides costs; as the judgment was in excess of the *ad damnum*, it was erroneous. *Grosvenor v. Danforth*, 16 Mass. 74. *Hemmenway v. Hikes*, 4 Pick. 497. *Hichins v. Lyon*, 35 Ill. 150.

The demandants' right is collaterally affected by the judgment against Jacobs; and as the demandants were not parties or privies to that judgment so that they can reverse it on error, they can avoid it by proof. *Vose v. Morton*, 4 Cush. 27. *Laflin v. Field*, 6 Met. 287. *Downs v. Fuller*, 2 Met. 185. *Tarbell v. Jewett*, 129 Mass. 457.

As this point is quite decisive of the case, it is unnecessary to consider whether, had the judgment been valid, the fact that the attachment (which was limited to \$2000) was less than the amount of the levy would have the effect upon the levy by sale that it would seem to have upon a levy by extent. See *Chickering v. Lovejoy*, 13 Mass. 51, 56.

*Judgment for the demandants.*

*S. C. Bancroft*, for the tenant.

*G. B. Ives*, for the demandants.



BRIDGET E. HASTINGS *vs.* ALBERT WEBER & others.

Suffolk. Jan. 21. — July 2, 1886. DEVENS & GARDNER, JJ., absent.

A. directed his agent to look for a store for him, and to negotiate for a lease of it. The agent wrote a letter to A., stating that he had been looking at B.'s store, containing a description of the premises, naming the annual rent asked for a term of five years, and inquiring whether the premises and amount of rent were satisfactory. A. telegraphed to the agent as follows: "If basement included at four thousand secure five years' lease." This telegram was handed by the agent to B., who verbally accepted the offer. *Held*, that there was not a sufficient memorandum in writing of a contract to accept a lease within the statute of frauds, to enable B. to maintain an action against A.

W. ALLEN, J. This is an action for breach of an agreement to accept a lease. The declaration alleges a contract with the defendants, by which the plaintiff agreed to let to them certain

premises for the term of five years from the first day of February, 1883, at the yearly rent of \$4000, and the defendants agreed that they would hire the premises, and execute and accept a lease thereof for such term at said rent, and would pay the rent of \$4000 a year during said term.

There was no written contract, and the plaintiff relies upon a verbal contract between herself and the agent of the defendants; and the only question presented by the exceptions is, whether there is a sufficient memorandum in writing of the contract to satisfy the statute of frauds.

The memorandum must be found, if anywhere, in the letters of the defendants' agent to them of January 2 and 3, 1883, and in the telegram of the defendants to their agent of January 3. There is no evidence that the agent had any authority to sign a memorandum, and the only paper signed by the defendants is the telegram. This was sent in answer to the letter of January 2, and before the letter of January 3 was received by the defendants. It is contended that it is so connected with the letter of January 2 as to incorporate that into itself, and make the letter and telegram together a memorandum signed by the defendants. Assuming, without deciding, that such is the correct construction of the two papers, we think they do not constitute a memorandum of the contract declared on, or of any contract. It is clearly not a memorandum of a completed contract, and the most that can be claimed is that it constitutes an offer by the defendants to the plaintiff, the subsequent verbal acceptance of which by the plaintiff gave it effect as the contract of the defendants. If we could adopt the assumption upon which this argument must rest, and hold that the telegram must be taken to include the letter of January 2, and that the presentation of the telegram to the plaintiff on January 3 was in legal effect the exhibition of the letter and the telegram to the plaintiff by the defendants through their agent, the principal question, and the only one we need consider, would be presented: Does the telegram import a promise by the defendants to the plaintiff to accept a lease described in it and the letter?

The correspondence is not between the parties to the supposed contract, but between one of the parties and his own agent, and it is to be construed accordingly. The agent was directed to

look for a store for the defendants and to negotiate for a lease of it. He had no authority, unless from the telegram, to accept a lease, or to make a contract, or to determine any of the terms of a lease or of a contract. His letter informed the defendants that he had been looking at the store of the plaintiff, contained a description of the premises, and stated the annual rent asked for a term of five years, as information to the defendants as the basis of further instructions. The question of the letter was whether the premises and the amount of rent were satisfactory to the defendants. It did not refer to the particular terms or conditions of a lease, such as when the term should commence, when the rent should be payable, what alterations should be made in the premises, or what condition they should be put in by the owner, what alterations might be allowed to be made by the defendants, what rights the defendants should have as to underletting, and other particulars that might enter into the lease. The answer was, with the brevity of correspondence by telegraph, "If basement included at four thousand secure five years' lease." This was obviously intended only as instructions to the agent that, if the rent would be of the amount stated, he should continue his negotiations and procure a lease, the only contract contemplated, to be submitted to the defendants for their acceptance and execution.

The instructions in the telegram do not exclude, but accord with, other instructions as to the contents of the lease that may have been given by the defendants to their agent; and, as between the parties to the correspondence, they contain in legal effect the additional words, "according to instructions which have been or may be given." Instructions to the agent, referring only to the particulars mentioned in the letter to which they were in reply, cannot be construed as including a promise or offer to the plaintiff to accept a lease containing only those particulars. The plaintiff had no right so to treat it, and that she did not in fact so regard it appears from her declaration, which alleges that the term was to commence on February 1, and not immediately, as would be implied from the writings, and also from the evidence that she understood that the defendants were not to have the power of underleasing, which could not have been inferred from the writings.

Whether a correspondence between one party to a verbal contract and his agent, before the completion of the contract, can, under any circumstances, constitute a memorandum of the contract, we need not consider. The correspondence in this case shows only instructions to an agent, not including authority to contract, and the disclosure of the instructions to the other party cannot convert them into a memorandum of a contract.

The letters subsequent to January 3, and the lease signed by some of the defendants, but not accepted or delivered, refer to the incomplete contract of lease, and have no bearing upon the question whether the defendants had agreed to execute the lease, unless as showing that they did not consider themselves under any contract to do so, and cannot go to make up a memorandum of such a contract.

*Judgment for the defendants.*

*A. E. Pillsbury*, for the plaintiff.

*C. J. Noyes*, for the defendants.

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### EDMUND FITZGERALD vs. ALMIRA A. LIBBY.

Middlesex. March 4. — July 2, 1886. W. ALLEN & HOLMES, JJ., absent.

A mortgage made by A. embraced four different parcels of land. Each of the first three parcels was described separately by a general description referring to the deeds, recorded in a certain registry, by which it was conveyed to him, with an exception of the lots embraced in such parcel which had been previously conveyed by the mortgagor. The fourth parcel was described as "the land by me owned" in a certain locality; "for boundaries and description reference is made to deeds to me recorded in said registry;" and the deed did not in terms except lots in this locality previously conveyed. In fact, the mortgagor had previously conveyed a portion of the fourth parcel by a deed which was not recorded until after the mortgage was recorded. *Held*, that such portion did not pass by the mortgage.

CONTRACT to recover \$100, paid by the plaintiff to the defendant at a sale by auction of certain land, under a power of sale contained in a mortgage held by the defendant. Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

The land sold to the plaintiff is composed of lots 288 and 289 on a plan of a large tract of land formerly belonging to Daniel Ayer, and known as "Ayer's new city," said city being situate in Lowell, westerly of the Boston and Lowell Railroad, and southerly of the Chelmsford Road, so called.

The two lots were struck off to the plaintiff as the highest bidder at said auction, and the plaintiff, in accordance with the terms of sale, paid the defendant \$100 at the time of the sale. The plaintiff afterwards refused to accept a deed, on the ground that the two lots in question were not included in the mortgage under which the defendant assumed to sell them.

The mortgage in question was executed by Daniel Ayer, on October 20, 1854, and was recorded on October 24, 1854. The lots conveyed were described as follows:

"All my Silver Lake land, so called, situate in Wilmington in said county, being all the land in said town bought by me of Charles F. Abbott by deed duly recorded in Middlesex registry, and also of one Jacob Manning, and also of one Jones and one Durgin, all adjoining and on a plan made by one Butterfield, and for further description reference is made to deeds of said several pieces duly recorded in said registry, saving and excepting a few lots thereof which I have already conveyed. Also all the land in said Wilmington by me purchased of one Jaques of Worcester, to which deed, duly recorded in said registry, reference is made for further description, except a few lots by me conveyed. For Manning deed, see Book 691, page 81. For Jaques, Book 688, page 96. See also other deeds in said registry. Also all those parcels of land situated in Wilmington, in said county of Middlesex, which were conveyed to me by James Holton by his deed dated June 7th, A. D. 1854, and recorded in the Middlesex county registry of deeds, Book 688, page 123 & 124, excepting certain parts thereof which I have heretofore sold and conveyed by my deeds. Reference may be had to said Holton's deed to me, and the record thereof, and of the deed of parts thereof given by me heretofore, for a full and perfect description of the premises. Also all the land by me owned and situate in my new city, so called, in said Lowell, being land situate in said Lowell westerly of Boston and Lowell Railroad, and southerly of the Chelmsford Road, so called; for

boundaries and description reference is made to deeds to me, recorded in said registry."

On January 6, 1852, Daniel Ayer conveyed lot 288, by a warranty deed, to David Corner. This deed was recorded on May 16, 1855. On January 6, 1852, Ayer also conveyed lot 289 to Lyman J. Sanborn. This deed was recorded on January 12, 1856.

The defendant contended that the description in the mortgage included, in legal effect, said two lots 288 and 289, and passed the same as against said prior deeds, and asked the judge so to rule. The judge ruled in accordance with this request, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*A. G. Lamson, (J. J. Hogan with him,)* for the plaintiff.

*G. F. Richardson & F. W. Qua,* for the defendant.

C. ALLEN, J. The only question is whether, by the true construction of the mortgage, lots 288 and 289 are to be deemed to have been included in the description of the land conveyed thereby. If they are, the plaintiff cannot recover. If they are not, his exceptions must be sustained. In determining this question, we must look at the whole of the mortgage, in the light of the circumstances under which it was given.

It embraces four different parcels, or clusters of parcels, of land. In respect to the first three of these, there is in each case a description of land, or a reference to deeds which are designated, sufficient to enable one to ascertain the boundaries of a larger quantity of land originally owned by the grantor, from which he had conveyed certain portions or lots to former purchasers. That is to say, the grantor, having bought in each case a large lot of land, and having sold portions thereof, then granted the residue by a mortgage in effect describing the whole of the large lot, and excepting therefrom such portions as he had already conveyed. By a somewhat cumbersome process, any one familiar with the premises could ascertain precisely what was intended to be included in the mortgage. In respect to the fourth parcel, however, the phraseology was changed, and the language of the conveyance is as follows: "Also all the land by me owned and situate in my new city, so called, in said Lowell, being land situate in said Lowell westerly of Boston and Lowell



Railroad, and southerly of the Chelmsford Road, so called; for boundaries and description reference is made to deeds to me recorded in said registry." No deeds are specifically designated, and there is no exception of lots already conveyed by him. In point of fact, it appears that there was a large tract of land in Lowell formerly belonging to Ayer, the grantor, and known as "Ayer's new city," which was the same "new city" mentioned in the mortgage, and the lots 288 and 289 were a part of said new city, and were shown on a plan of the whole tract, and had been sold by the grantor prior to the giving of the mortgage, by warranty deeds not recorded until after the mortgage was recorded. Whether or not other lots had also been sold by him does not appear in distinct terms. But it may be inferred that the large tract was either actually improved, or was designed to be improved, by laying it out into streets, and lots for sale.

The bill of exceptions is rather meagre in its facts. But, taking such facts and circumstances as we have, it seems to us that the change in the phraseology, when the fourth parcel was to be described, shows that the intention was to include only such land as the grantor then owned. There is no specific description of land, and no specific designation of deeds where a description can be found. The conveyance is a mortgage, and not an absolute deed. The reference to the source of the grantor's title is of the most general description: "for boundaries and descriptions reference is made to deeds to me recorded in said registry." This reference, while certainly entitled to some weight, is entitled to less than if it were more specific; and, in view of the whole instrument, it is not sufficient to lead to the conclusion that the grantor intended to convey all that was conveyed to him by those deeds. In all the earlier instances, where there was a definite exception of lots already conveyed away by the grantor which otherwise would form a part of the premises described, the description of the whole original tract was also more definite.

In this last instance, where, for some reason, the original tract is not described, the change of phraseology and the omission of such an exception support the inference that a similar result was intended to be reached, and that the grant was understood to be limited to such portion of the large tract as was then

owned by the grantor. It can hardly be supposed that he would intend to include in the mortgage land which he had already granted away to others. The grantee in the mortgage was fairly put upon inquiry. If he was content to accept a grant with so indefinite a description, he must take the risk. Otherwise, if the grantor had sold all of the large tract but two or three scattered lots, and then made a deed like the present for the purpose of conveying what was left, it would take effect in priority to any former deeds which might chance to remain unrecorded, thus working a practical fraud on the earlier grantees, and entirely subverting the grantor's intention. Where a conveyance is made with no particular description of the land, the words "all the land by me owned" are more naturally understood to mean "all the land now owned by me;" which is equivalent to "all the land which I have not heretofore conveyed;" and such, we think, is the true construction of the present mortgage.

We do not find that the case of *Woodward v. Sartwell*, 129 Mass. 210, which is principally relied on by the defendant, decides anything to the contrary of this; while the construction above given to the mortgage derives more or less support from numerous other decisions in this State and elsewhere. *Worthington v. Hylyer*, 4 Mass. 196. *Adams v. Cuddy*, 13 Pick. 460. *Sweet v. Brown*, 12 Met. 175. *Chaffin v. Chaffin*, 4 Gray, 280. *Hoxie v. Finney*, 16 Gray, 332. *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159. *Mills v. Shepard*, 30 Conn. 98. *Brown v. Jackson*, 3 Wheat. 449. *Hamilton v. Doolittle*, 37 Ill. 473. *McConnel v. Reed*, 4 Scam. 117. *Starling v. Blair*, 4 Bibb, 288. *Morrell v. Fisher*, 4 Exch. 591.

For these reasons, in the opinion of a majority of the court, the entry must be,

*Exceptions sustained.*

GEORGE MORBILL, trustee, *vs.* WALTER R. PHILLIPS  
& others.

Suffolk. March 16. — July 2, 1886. W. ALLEN & HOLMES, JJ., absent.

A testator, by his will, gave to his widow the use of his homestead and the income of \$10,000 during her life. He directed in the third clause that the residue of his estate should be divided into four equal parts; one part he gave for the benefit of his grandson W., the son of a deceased son; another fourth part he gave to his son G.; the other two parts he gave to trustees to pay the income to his two sons J. and F., in equal shares during their lives, and, on the death of either leaving children and a wife, the reversion was to go to such children and wife. The third clause then proceeded, "but if they leave no issue, then my will is that said reversion in both cases or either case shall go to all my grandchildren in equal shares, as hereinafter provided in reference to other portions of my estate." By the fourth clause, he directed that the reversion and remainder of the homestead and said \$10,000 should be divided into four equal parts; he gave one part for the benefit of his grandson W., upon the same terms named in the third clause; one part to his son G. absolutely; and the other two parts in trust for the use of his two sons J. and F., "on the same terms as hereinbefore provided, . . . and with the same disposition of the reversion and the remainder to their wives and children, if any children they should leave, and, if not, then equally to all my grandchildren that may be living." *Held*, on the death, unmarried, of J., who survived the widow, that his share of the funds provided for in both clauses of the will should be divided equally *per capita* among the grandchildren of the testator who were living at the death of J.

MORTON, C. J. By his will, the testator, Samuel M. Phillips, gives to his widow the use of his homestead and the income of a fund of \$10,000 during her life. He directs, in the third clause, that the residue of his estate shall be divided into four equal parts; one part he gives for the benefit of his grandson Walter R. Phillips, the son of his deceased son Samuel S. Phillips; another fourth part he gives to his son George A. Phillips; the other two parts he gives to his executors, as trustees, to pay the income to his two sons Joseph R. Phillips and Flavel M. Phillips, in equal shares during their lives, and, on the decease of either leaving children and a wife, the reversion is to go to such children and wife. The third clause then proceeds, "but if they leave no issue, then my will is that said reversion in both cases or either case shall go to all my grandchildren in equal shares, as hereinafter provided in reference to other portions of my estate." By the fourth clause, he directs that the reversion and remainder of the homestead and of the said \$10,000 shall

be divided into four equal parts, and he gives one part for the benefit of his grandson Walter R. Phillips, upon the same terms named in the third clause; one part to his son George A. Phillips, absolutely; and the other two parts to his executors, in trust for the use of his two sons Joseph R. Phillips and Flavel M. Phillips, "on the same terms as hereinbefore provided, . . . and with the same disposition of the reversion and the remainder to their wives and children, if any children they should leave, and, if not, then equally to all my grandchildren that may be living."

The widow died in 1878. Joseph R. Phillips died in 1885, having never been married; and the object of this bill in equity is to obtain the instructions of the court as to the disposition of the share held by the trustee under the will for the benefit of the said Joseph R. Phillips.

It was clearly the intention of the testator that the funds provided for in both the third and the fourth clauses should, upon the death of Joseph or Flavel leaving no children, go in the same manner and to the same persons. The provision of the third clause, that the reversion shall go to his grandchildren "as hereinafter provided in reference to other portions of my estate," by necessary construction, refers to the fourth clause, and was intended to provide that the same grandchildren as take under the fourth clause should take such reversion. By the latter clause, the reversions and remainders are, upon the death of Joseph or Flavel respectively, to go to their wives and children, "if any children they should leave, and, if not, then equally to all my grandchildren that may be living." The natural and obvious meaning of the words quoted is, that the property is to go to the grandchildren living at the death of Joseph or Flavel. The words "that may be living" cannot fairly be referred to any other time. It seems to us clear that the intention of the testator, which must control the construction of the will, was that the funds should go to all his grandchildren who were living at the period fixed by him for the final distribution of the funds. *Denny v. Kettell*, 135 Mass. 138.

The provisions that the property was to "go to all my grandchildren in equal shares," and that it was to go "then equally to all my grandchildren that may be living," show clearly that

the testator contemplated and intended that each grandchild should have the same share, and repel the claim that the property is to be divided among the grandchildren *per stirpes*.

The result is, that the ten grandchildren of the testator who were living at the death of Joseph R. Phillips are entitled to have the funds in question divided among them equally *per capita*.\*

*Decree accordingly.*

*C. H. Swan & G. H. Poor*, for the grandchildren of the testator.

*A. Poor*, for the heirs of deceased grandchildren.



WILLIAM NUTT & others *vs.* WILLARD A. NORTON  
& another.

Middlesex. March 18. — July 2, 1886. W. ALLEN & HOLMES, JJ., absent.

A widow, with three children, whose only property was derived from her deceased husband, contemplating a second marriage, made a will, by which she bequeathed all her property received from her first husband to her three children. Her intended husband knew the contents of the will, and orally assented to its execution. The widow then married, and had a child by her second husband. *Held*, that the will was thereby revoked.

APPEAL from a decree of the Probate Court, disallowing the will of Lydia F. Wheeler, a petition for its allowance having been filed by William Nutt, as administrator with the will annexed. The case was heard by *Field, J.*, and reported for the consideration of the full court, in substance as follows:

On March 7, 1883, the day of making the will, Lydia F. Wheeler was the widow of Joseph W. Wheeler and the mother of three children, then and now living, of whom said Joseph was

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\* At the death of the testator, his heirs were three sons, George A. Phillips, Joseph R. Phillips, and Flavel M. Phillips, and a grandson, Walter R. Phillips. At this time George A. Phillips had six children, and Flavel M. Phillips had three children, two of whom died before Joseph R. Phillips. After the death of the testator and before the death of Joseph R., Flavel M. had two other children.

the father. Said Lydia and Willard A. Norton were married on March 8, 1883, and thereafter, until her death, lived together as husband and wife at Natick. Subsequently to such marriage they had a child, the issue of the marriage, who survived her. Said Lydia died within a few days after giving birth to such child, possessed of real and personal estate, which came to her from said Joseph W. Wheeler. At the time of making said will, and afterwards, she had no property other than what she had received, directly or indirectly, from him.

On March 7, 1883, said Lydia, accompanied by Norton, went into the office of Nutt, and told him that she wanted to make her will. Nutt then said to her that he thought she was going to be married, and she replied that she was going to be married the next day. She then instructed Nutt how to prepare her will, which he did while she and Norton remained there, and read it to her in the presence and hearing of Norton. By the will, she gave "my watch, clothing, and furniture" to her daughter, and the residue of her property "that I received from their father," in equal shares, to her three children. Norton was one of the subscribing witnesses to the will. Nutt remarked that the will rather cut off Norton. She said he understood it, and Norton said, "That is all right."

The judge found that the will was duly executed and published in the presence of the attesting witnesses, and that said Lydia was then of lawful age and of sound mind; ruled that the will was revoked by the subsequent marriage and the birth of issue; and affirmed the decree of the Probate Court.

*E. F. Dewing*, for the appellants. 1. The Pub. Sts. c. 127, § 8, after providing that no will shall be revoked "unless by the burning, tearing, cancelling, or obliterating of the same, with the intention of revoking it," provides that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." Under this clause it is submitted that the party against whom an implication of law is invoked may rebut the facts in evidence from which the implication results.

The doctrine of revocation by implication of law is founded on the presumption that the testator would not have made the will in question, if he had contemplated, understood, and

appreciated the subsequent changes in his condition or circumstances.

The case of *Swan v. Hammond*, 138 Mass. 45, rests upon the principle here contended for. The facts from which the law implied an absolute revocation in that case were in no way rebutted. The testatrix there made her will in 1853, married in 1861, and died in 1883. "Her husband had no knowledge of the existence of the will until after her decease."

2. The facts from which it is contended that a revocation results in this case are rebutted. If Lydia Wheeler anticipated the changes in condition or circumstances her marriage would naturally occasion, and provided for it, then there is no revocation by implication of law. She was a widow with three children, and so prepared to anticipate the "changes in condition or circumstances" her anticipated marriage might naturally occasion. She disposed of the property that had come to her from her deceased husband by giving it to her children by him.

The will does not undertake to dispose of subsequently acquired property, and the inference is that she intended that property which had not come to her from her deceased husband, as well as subsequently acquired property, should be distributed under the general laws of distribution.

The language of the New York statute cited in *Swan v. Hammond*, *ubi supra*, and construed in *Brown v. Clark*, 77 N. Y. 369, is as follows: "A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." This statute makes an absolute rule of property, depending for its existence on the simple fact of marriage by a feme sole subsequently to the making of the will, which the court is bound to declare. Under the Massachusetts statute, the court is bound to inquire into the changes and circumstances affecting the testator subsequently to the making of his will, and then to determine, under the rules and forms of law, whether the testator, notwithstanding the changes in condition and circumstances, intended the will to take effect after marriage and death.

In the case at bar, it is evident that Lydia S. Wheeler made her will with the intention that it should take effect after her marriage and death; that she fully understood and appreciated the changes in circumstances and condition her marriage with

Willard A. Norton might naturally occasion, and provided for them in the will.

3. W. A. Norton, having witnessed the will with full knowledge of its contents, and assenting thereto at the execution of it, is estopped to deny its validity. *Child v. Sampson*, 117 Mass. 62. *Melley v. Casey*, 99 Mass. 241.

*C. Robinson, Jr.*, for the appellees.

MORTON, C. J. It was decided in *Swan v. Hammond*, 138 Mass. 45, that a will of a woman was revoked by her subsequent marriage. See also *Blodgett v. Moore*, 141 Mass. 75. In the case before us, after the will offered for probate was executed, the testatrix married, and had a child born of the marriage who survived her.

Upon these facts, a revocation of the will is implied by law, and this implication cannot be rebutted by parol evidence that the parties did not know the rule of law, or that they did not intend that the subsequent marriage and birth of a child should operate as a revocation. *Marston v. Roe*, 8 A. & E. 14.

The will does not make any provision for the husband or after-born children. The fact that the man the testatrix was about to marry witnessed the will, and the parol evidence that he knew its contents, are immaterial. Whether the act of the husband in witnessing the will could, by way of estoppel, prevent him from contesting the will, if he were the only party interested, as contended by the appellants, we need not discuss. It certainly cannot operate to give validity to the will as against the after-born child. Upon the facts of this case, therefore, we are of opinion that the will offered for probate was revoked by implication of law.

*Decree affirmed.*



**GEORGE F. LIBBY vs. JOHN NORRIS & others.**

Middlesex. March 24. — July 2, 1886. W. ALLEN & HOLMES, JJ., absent.

Where the persons having similar interests in the subject matter of a suit in equity are numerous, it is within the discretion of the court to entertain the bill, although brought by one of such persons only, in behalf of himself and of all the others who may become parties thereto.

**BILL IN EQUITY**, brought by the plaintiff, in behalf of himself and of all other creditors of Vital Roberts who might become parties thereto, against John Norris, Henry Norris, and Vital Roberts, alleging that, on April 28, 1882, Roberts was doing business in Lowell, and was possessed of certain personal property; that Roberts was indebted to twenty-five persons and firms named, including the plaintiff and the defendants Norris, in amounts specified; that, on said day, Roberts was unable to pay his debts and was insolvent; that the defendants Norris, copartners under the firm name of Norris Brothers, brought an action against Roberts upon their claim, and attached all said personal property of Roberts, except book accounts and bills receivable; that the defendants Norris, with the fraudulent purpose of obtaining the exclusive possession and control of the assets of Roberts, and of preventing his other creditors from sharing therein and receiving any portion of their claims therefrom, induced Roberts not to apply for the benefit of the insolvent law, but to assign to them all his book accounts and bills receivable, and to surrender to them all his interest in the personal property attached, upon their promise that they would collect and realize said bills and accounts to the best advantage, and would hold the proceeds of the same and of the personal property for the benefit of all the creditors of Roberts, and would distribute said proceeds and assets among all the creditors in proportion to their respective claims; that said creditors of Roberts, including the plaintiff, were induced to forbear bringing actions upon their claims against him, upon the promise of the defendants Norris to convert said assets into money, and hold the same for the common benefit of all the creditors of Roberts, and distribute the same proportionally among all said creditors; that, in further pursuance of their fraudulent purpose, the defendants Norris proceeded

to reduce said assets of Roberts to money, and denied that the plaintiff and the other creditors of Roberts were entitled to any part of said proceeds, and refused to account for and distribute the same among said creditors, but claimed to hold all said assets as their own property; and that all said assets of Roberts in the hands of the defendants Norris were held in trust for the common benefit of all the creditors of Roberts in proportion to their respective claims.

The prayer of the bill was for discovery, for an account, and for general relief.

At the hearing in the Superior Court, before *Knowlton*, J., before any evidence was introduced, the defendants asked the judge to rule that the plaintiff could not maintain his bill, as framed, for the following reasons: "1. Because it appears by the bill itself that there are persons who ought to be made parties to the suit, who have not been made parties. 2. Because it does not appear by the bill that the plaintiff had in fact any authority to bring the suit on behalf of the creditors mentioned in the bill."

The judge refused so to rule; and made an interlocutory decree, establishing the existence of the trust as alleged in the bill; ordering all creditors holding valid claims against Roberts, and not voluntarily appearing to prove such claims, to be cited to prove them before a master, by publication of a citation therefor in a manner specified; providing that all creditors not appearing and becoming parties to the bill, when cited thereto, should be debarred from any share in said trust fund, and that all creditors appearing and becoming parties to the bill should be entitled to share in said trust fund in proportion to the amount of their respective claims, and to receive their dividend therefrom; and referring the case to a master to hear all parties interested, to receive proof of all claims of creditors holding valid claims against Roberts, and to return to the court a statement showing the total amount of the trust fund in the hands of the defendants Norris, the names of the creditors who should prove their claims, and the amount of such claims. The defendants alleged exceptions.

*C. H. Conant & J. H. Carmichael*, for the defendants.

*F. W. Qua & A. G. Lamson*, for the plaintiff.

MORTON, C. J. It is at least doubtful whether exceptions taken in the course of the trial in a suit in equity in the Superior Court can properly be entered in this court until there has been a final decree in the case. But, waiving this, it is clear that these exceptions cannot be sustained.

The bill is brought by the plaintiff, on behalf of himself and numerous other creditors of Vital Roberts, to enforce a trust. The interest of all the creditors in the question to be tried is the same. It is well settled that such a bill may properly be brought, or at least that it is within the discretion of the court to entertain it. *Sears v. Hardy*, 120 Mass. 524. *Smith v. Williams*, 116 Mass. 510. *Birmingham v. Gallagher*, 112 Mass. 190. *Bryant v. Russell*, 23 Pick. 508. Story Eq. Pl. § 102.

In such cases, the court will take measures to see that all the creditors interested have the opportunity to come in and protect their rights. This has been done by the interlocutory decree entered in the Superior Court, which guards the rights of all parties in interest. \*

*Exceptions overruled.*

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ATTORNEY GENERAL- *vs.* RUFUS H. BRIGHAM, executor,  
& others.

Middlesex. March 22. — July 2, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

Money was contributed for the erection of a soldiers' monument in a town, and a committee was appointed to have charge of the fund, and to erect a monument when the fund should be sufficient therefor. B., who was the treasurer of the committee, deposited the money in a savings bank in his name as "treasurer of monument association." Afterwards he drew from the bank a part of the sum deposited, and appropriated it to his own use. He died subsequently; his will was duly proved, and an executor thereof appointed, who gave bond and due notice of his appointment. Upon B.'s death, C. was appointed treasurer of the committee; and, more than two years after B.'s executor gave bond, C. demanded of him payment of the sum misappropriated, which demand was refused. *Held*, on an information in equity by the Attorney General, at the relation of the committee, that, if the funds could be considered as given to a public charity, the proceeding, so far as it concerned the amount appropriated by B., was barred as to B.'s executor by the Pub. Sts. c. 186, § 9, limiting suits against executors to two years after the time of giving bond; and that it could not be maintained

against the heirs at law of B., or the town. *Held, also*, that, as all parties agreed, the plaintiff might take a decree that the fund in the bank be paid to the committee or to C., to be held for the purposes for which the money was contributed.

INFORMATION IN EQUITY, filed October 3, 1884, at the relation of a voluntary committee of citizens residing in the town of Hudson, against the executor of the will of Francis Brigham, his heirs at law, the Hudson Savings Bank, and the said town. The case was heard by *Morton, C. J.*, and reported for the consideration of the full court. The facts appear in the opinion.

*G. A. King*, for the plaintiff.

*C. H. Welch*, for Hudson.

*J. G. Abbott*, (*W. H. H. Andrews* with him,) for the other defendants.

MORTON, C. J. The material facts in the case are as follows: In the years 1865 and 1866 a large number of individuals contributed money to create a fund for the erection of a monument to the soldiers who had died in the late war. A committee was appointed to have charge of the fund, and to erect a monument whenever it should, by accumulation, be sufficient therefor. Francis Brigham was one of the committee, and the treasurer thereof. He deposited the funds in the Hudson Savings Bank, in his name as "Treasurer of Monument Association." On July 11, 1877, the deposit amounted to about \$2300, and on that day said Brigham drew from the savings bank the sum of \$1500, and appropriated it to his own use. Said Brigham died on December 7, 1880; his will was duly proved; the defendant Rufus H. Brigham was duly appointed executor on November 1, 1881, and on the same day gave bond and due notice of his appointment. Upon the death of Francis Brigham, Luman T. Jefts, one of the relators, was appointed in his place as treasurer of the committee or association; and, on March 1, 1884, Jefts demanded of the said executor the payment of said sum of \$1500 and interest, which demand was refused.

If we assume that the funds in question were given to a public charity, and that the Attorney General might, by an information in equity, enforce the due application of them, we are of opinion that this information cannot be maintained against the executor or the heirs of Francis Brigham, or the town of Hudson.

It does not allege any facts which would render the heirs liable under the Pub. Sts. c. 136, § 26; and it is clear that the town of Hudson has no interest whatever in the subject matter of the suit.

The principal question is whether the claim against Francis Brigham, which it is the object of the information to enforce, is barred by the special statute of limitations, which provides that "no executor or administrator, after having given due notice of his appointment, shall be held to answer to the suit of a creditor of the deceased, unless such suit is commenced within two years from the time of his giving bond for the discharge of his trust." Pub. Sts. c. 136, § 9.

Upon the facts of the case, we are of opinion that the relators, so far as regards the sum of \$1500, cannot be regarded in any other light than as general creditors of the estate of the testator. This sum did not come into the hands of the executor as a separate sum held by the deceased as a trust. The money drawn from the bank was spent by the deceased, and did not come into the hands of the executor at all. He was bound to administer the assets which came to his possession according to law, and had no right to set apart a portion of the general assets and clothe it with a trust. If any specific property or fund held by the testator in trust came into the hands of the executor, he would be required to hold it for the use of the *cestuis que trust*. Such property would not be assets of the estate to be administered by him as executor. Of this character is the fund of about \$800 now in the Savings Bank. It is not a part of the assets of Francis Brigham, but belongs to the relators in trust.

Mr. Justice Story states the rule of law with great clearness. He says: "Executors are charged with no more, in virtue of their office, than the administration of the assets of the testator. If, at the time of his death, there is any specific personal property in his hands, belonging to others, which he holds in trust, or otherwise, and it can be clearly traced and distinguished from the testator's own, such property, whether it be goods, securities, stock, or other things, is not assets to be applied in payment of his debts, or to be distributed among his heirs; but is to be held by the executors as the testator himself held it. But if the testator has money, or other property, in his hands, belonging to

others, whether in trust or otherwise, and it has no ear-mark, and is not distinguishable from the mass of his own property, the party must come in as a general creditor; and it falls within the description of assets of the testator." *Trecothick v. Austin*, 4 Mason, 16. This rule has been adopted and recognized in several cases by this court. *Johnson v. Ames*, 11 Pick. 178. *Harlow v. Dehon*, 111 Mass. 195. *Burgess v. Keyes*, 108 Mass. 43.

It may be that Francis Brigham, if he were living, could not avail himself of the general statute of limitations as a defence, because of the rule that the statute of limitations does not run in favor of a trustee until there has been an unequivocal repudiation and termination of the trust. But, upon his death, the relators became merely creditors of his estate, and fell within the provisions of the special statute limiting suits against executors to two years after the time of giving bond. For these reasons, the information must be dismissed as to the executor and the heirs, and as to the town of Hudson. But, as all parties agree, there is no objection to the plaintiff taking a decree that the balance in the hands of the Hudson Savings Bank be paid to the relators, or to said Jefts, the treasurer of the committee, to be held for the purposes for which the money was contributed.

*Decree accordingly.*



MARY KEEFE vs. BOSTON AND ALBANY RAILROAD  
COMPANY.

Suffolk. Nov. 11, 1885. — July 3, 1886. DEVENS & GARDNER, JJ.,  
absent.

A railroad corporation is liable for personal injuries occasioned to a passenger by the unsafe condition of the platform at a station, along which he was walking, after alighting from a train, for the purpose of leaving the station to go to his home, if the platform at that place was fitted and intended for the use of passengers, or was so arranged as to invite them to use it, although the corporation was under no obligation to furnish such a platform, and the proper mode of egress from the station to the nearest highway was in an opposite direction to that in which the passenger was going; and the fact that he intended, after leaving the platform, to cross the railroad at a place where he had no right to

cross it, does not make him a trespasser, or mere licensee, when and where he was injured.

In an action against a railroad corporation for personal injuries occasioned to a passenger by coming into collision with a baggage truck, while walking along the platform at a station, after alighting from a train, the questions whether he backed against the truck, or was struck by it, whether he or the servant of the corporation who was pulling the truck was in the exercise of due care, and whether the platform was properly lighted, are for the jury.

TORT for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. Trial in the Superior Court, before *Knowlton, J.*, who allowed a bill of exceptions, in substance as follows:

It appeared in evidence that the plaintiff, on October 23, 1883, purchased a ticket at the station of the defendant corporation in Boston, for a passage over its railroad to Newton, the residence of the plaintiff, and took a train from Boston which arrived at Newton about twenty minutes past six o'clock on the same evening.

The plaintiff testified, that, upon her arrival at Newton, she left said train in company with her two daughters, stepped on to the platform of the defendant's railroad station at a point opposite the door of the ladies' room of said station, and proceeded directly over and along said platform in a westerly direction for the purpose of reaching her house in Newton; that while so walking along said platform, past the westerly shed thereon, she was suddenly struck, thrown from said platform upon the track of the railroad, and received the injuries complained of; that upon her arrival at Newton it was dark; that she saw no lights upon said platform, and heard no sign of warning before being struck; and that her eyesight and hearing were at that time ordinarily good.

Edward Downs testified that he was an expressman, and was at the defendant's station in Newton at the time of the accident to the plaintiff; that the baggage-master of the defendant was pulling a baggage truck laden with baggage, which had arrived on the same train with the plaintiff, over said platform, and the witness was walking behind said truck with his right hand on a tub of butter, and his left hand holding some express slips, which he was reading while stooping down; that there was on the platform a covered shed, and the truck, when it arrived at

the shed, came to a stop, and he saw the plaintiff on the track beside the truck; that it was dark at the time; that there was no light on the truck, which was about thirty inches wide; that there were on it a long, narrow trunk, a tub of butter, and some packages; that there was a gas-light at the end of the station, thirty-five or forty feet from the point of the accident; that the shed projected in front of said gas-light, and partially obscured the same; that there were no lights along or on the outside of the shed; that under the shed, which was fifty-five or sixty feet long, and at the westerly end of the same, some bags of wool were piled up; and that the platform was the platform used for passenger purposes in connection with the station.

Cornelius Keefe testified that there were no lights upon the outside of the shed; but that there were two lights under the same, about twenty-five feet from each end of the shed.

John Flood testified that there was one light at the corner of said station, as above described, but no lights on the outside of said shed.

Melvine Cox testified that he was baggage-master at said station on the day of the accident; that, while hauling the baggage truck of the defendant, laden with baggage, over the platform from the baggage car of the train to the baggage-room of the station, he stopped the truck, and the plaintiff came along backwards, and hit the trunk on the truck, and was thrown on to the track; and that the plaintiff, at the time of such collision, had three or four bundles in her arms.

William C. Emerson testified that he saw the plaintiff about twelve feet from the truck, with three or four bundles in her arms, moving backwards; that the truck was stationary, and, when the plaintiff reached the truck, she staggered and fell on it; that the truck at that time was nearly opposite the gas-light; that there were no lights on the outside of the shed; that there were two lights under the shed; that the width of the platform from the posts of the shed to the track, at the point of the accident, was about ten feet; and that there was no light on the truck.

Wallace Holbrook testified that he was baggage-master in the defendant's employ at Newton on the day of the accident;



that he was behind the truck when the accident happened; that it happened at a distance of from thirty-five to forty feet from the westerly end of the station; that the truck was stationary at the time of the accident, and passengers were passing between the truck and the outer edge of the platform; that, at the point of collision, there was light enough to enable a person to walk without running into any obstacle; that there was a light at the end of the station, and two lights under the shed, as above described; that the platform was twenty to twenty-five feet wide, and about ten feet wide from the posts of the shed to its outer edge, at the point of collision; that the truck was about thirty inches wide from wheel to wheel; and that the trunk projected beyond the edges of the truck.

Frank A. Baums testified that the truck was from ten to fifteen feet from the gas-light, at the time of the accident.

Sumner R. Edmand testified that he was a civil engineer in the defendant's employ; that between the station and the public highway, and on the platform, was a shelter shed supported on posts and open at the sides, and a baggage-house at the end of the shed; that on the west side of the station there was a similar shelter shed extending eighty feet westerly from the station; that the edge of the eaves of the shed is eight feet from the ground, coming within about six feet of the edge of the platform; that the platform extended two hundred and sixty feet westerly from the station; that the platform, being on the southerly side of the railroad track, did not connect with any public street southerly of the track, and there was no way for passengers going along this platform of getting out on the south side of the track without crossing the track and the grounds of the railroad; that the space between the shed and the west end of the station was about six feet, and the roof of the shed was a pitch roof unplastered, and by measurement the width of the platform between the shed and the track was ten feet; and that the platform was designed for the accommodation of all the public who land at the station.

Edmand further testified, and his evidence was uncontradicted, that the station-house was one hundred and twenty-one feet long, its easterly end being about one hundred and twenty feet from Centre Street; that a platform extended easterly from

the station-house to the baggage-house, the nearest corner of which was about seven feet from Centre Street; that, easterly and southerly of the station-house, the whole open space between the station-house and Centre Street was a concrete walk or drive for access between the station and Centre Street; and that the platforms about the station did not connect with any other street than Centre Street.

It was in evidence that the plaintiff lived on School Street, which lies north of Washington Street, the nearest street north of and parallel with the railroad; that the only way from the station to her house, by a public way, was from the station to Centre Street easterly, northerly along Centre Street to Washington Street, westerly along Washington Street to School Street, and northerly along School Street, which leads from Washington Street, at a point westerly of where an alley-way from the north side of the railroad reaches Washington Street.

It appeared that the plaintiff was moving, when hurt, westerly along the platform from the place where she alighted from the train, intending to cross the railroad at a point opposite the alley-way leading to Washington Street, where there was no planking or prepared crossing on the railroad, and there were no steps for obtaining access to the alley-way from the north side of the railroad.

It was in evidence that the shelter shed west of the station-house was sixteen feet wide; that the gas-lights under it were seven feet or a little less above the platform; and that the eaves of the shed were eight feet above the platform.

The judge, at the request of the defendant, ruled that there was no evidence on which the plaintiff was entitled to go to the jury; and directed a verdict for the defendant. The plaintiff alleged exceptions.

*T. J. Gargan*, for the plaintiff.

*A. L. Soule*, for the defendant.

FIELD, J. The principal contention of the counsel for the defendant is, that, "as soon as the plaintiff began her progress towards the west, for the purpose of crossing the railroad at a place not intended nor prepared for such use, she ceased to have any right to protection as a passenger, because the safe and proper way of egress for passengers was in the opposite direction."

X There was evidence that the construction of the platform on the south side of the railroad, and the use made of it, were such that it was intended by the railroad company to be used by passengers, so far as was necessary or convenient for them in entering or leaving trains. The defendant's engineer testified that the "platform was designed for the accommodation of all the public who land at the station." The plaintiff cannot be considered as a trespasser, or a mere licensee, if, immediately on leaving the train, she chose to walk over the platform in the direction she was walking for the purpose of leaving the platform to go home, if the place where she was walking was fitted up and intended for the use of passengers. If the defendant was under no obligation to furnish such a platform, yet if it did furnish it, and arranged it in such a manner as to invite passengers to walk over it as they found it convenient while waiting for trains, or for conveyances to take them from the station, or while preparing to leave the station, it must exercise due care towards passengers found upon it. X That the plaintiff intended in her mind, after she left the platform, to cross the railroad at a place where she had no right to cross it, is not conclusive against her right of action. She was not necessarily a trespasser, or mere licensee, when and where she was struck, because she intended afterwards to become either one or the other.

X The well-known usages of railroad companies and of the public make it impossible to hold, as matter of law, that it was the duty of the plaintiff, immediately on leaving the cars at the station, to take the shortest practicable course to the nearest highway, and that, if she did not, she became a trespasser or licensee only. The defendant was bound to keep in safe condition for its passengers all that part of its stations and platforms where passengers were expressly or impliedly invited to go; and was bound, by its servants and agents, to exercise due care towards passengers using its station and platforms by its invitation. X The point where the plaintiff intended to cross the railroad is supposed to be the same as that mentioned in *Wheelwright v. Boston & Albany Railroad*, 135 Mass. 225; but whether the plaintiff, in crossing, would have been a licensee or a trespasser, we think, is immaterial. The intention in her mind of crossing the railroad at a point where she had no right to cross had not become

an act, and she might never have acted in accordance with that intention. She was still a passenger leaving the station of the railroad, and may have been walking upon a part of the platform intended for the use of passengers.

Whether the plaintiff backed against the truck, or was struck by it, whether she or the baggage-master of the defendant, who was pulling the truck, was, under the circumstances, in the exercise of due care, and whether the platform was properly lighted, were questions for the jury. *Exceptions sustained.*

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BOSTON SAFE DEPOSIT AND TRUST COMPANY vs. ELLA A. PLUMMER & others.

Suffolk. Nov. 20, 1885. — July 3, 1886. DEVENS & GARDNER, JJ.,  
absent.

A testator, by his will, provided that, at the death of his widow, two funds should be set apart in trust from the personal property; made a specific devise of a parcel of real estate; gave the trustee power to sell the residue, "the proceeds of which is to pay the following legacies;" and then gave three legacies of equal sums. There was a deficiency of the proceeds of the real estate, and a smaller deficiency of the personal property. *Held*, that the three legacies were specific legacies, and were not entitled to contribution from the personal property.

A testator, by his will, gave his property in trust for the benefit of his widow during her life; and, after her death, \$25,000 of the personal property was to be set apart for the benefit of the testator's daughter during her life, and \$12,000 for the benefit of the testator's granddaughter during her life. At the death of the daughter, certain real estate, which was given to her for life, was given to a city in fee for charitable purposes, "and also \$20,000 added to it." At the death of the granddaughter, \$5000 of the \$12,000 set apart for her use was given to the city for certain charitable purposes, and "the other seven thousand dollars of this twelve" was given to the same city for similar purposes. At the time of the widow's death the personal property amounted to about \$32,000, and it was managed by the trustee as a single fund, and proportionate parts of the income were paid to the daughter and granddaughter. The daughter died, and the fund depreciated so that it was not sufficient to pay the \$12,000 directed to be set apart for the granddaughter's use and the legacy of \$20,000 to the city. *Held*, that the legacy to the city was a general legacy; that the fund directed to be set apart for the daughter became general assets of the estate upon her decease; and that the personal property existing at the daughter's death should be divided between the city and the granddaughter proportionally.

**BILL IN EQUITY**, filed November 24, 1884, by the trustee under the will of Joseph F. Huntress, for instructions as to the construction of the will. Hearing before *W. Allen, J.*, who reported the case for the consideration of the full court, in substance as follows:

The testator died on October 30, 1876. His will, after giving certain legacies, some of which were to grandsons, proceeded as follows:

"7. I give to my wife, Sally D. Huntress, all my household furniture of every name and nature.

"8. After my debts and legacies to my grandsons have been paid, I then give and bequeath to my friend, George E. Foster of Boston, (now clerk for John S. Blair,) all the rest and residue of my property, both real and personal, in trust for the following trust purposes, to wit, to pay over to my wife all the net income of all my property during her life, with the understanding that my daughter Josephine is to live with her, and have everything for her comfort the same as now. At the death of my wife, if my daughter Josephine is alive, I give to her my estate No. 377 Harrison Avenue and No. 1 Gloucester Place, for her to have the use and income from during her life, and also the interest or income from twenty-five thousand dollars of my personal property, to be set apart by the judge for her during her life.

"9. At the death of my daughter Josephine, I give and bequeath to the city of Gloucester, my native place, this estate mentioned above, it being 377 Harrison Avenue and No. 1 Gloucester Place, in fee simple forever, and also twenty thousand dollars added to it. I give this estate and money for the purpose of establishing or supporting a home for indigent females of sixty years of age or over, natives of Gloucester, for a perpetual home, for the poor you will always have with you, to be managed by a board of directors, who shall make a yearly report. Make your entrance fee as low as possible.

"10. After the death of my wife, I desire there be set apart, in the hands of my trustee, twelve thousand dollars of my personal property, the income from which I give to my granddaughter, Ella Augusta Plummer, wife of George M. Plummer, for her especial benefit, during her life, and not to be under the

control of any husband or father, and at her decease I give five thousand dollars of this twelve to the city of Gloucester, for a perpetual fund, the interest of which I want applied to the furnishing of books and stationery, such as are in use at the time in public schools, to such poor children whose parents are too poor to furnish them. The other seven thousand dollars of this twelve, I give to the city of Gloucester for a perpetual fund, the interest of which I want applied to the relief of poor widows and their children, whose husbands and fathers have gained a settlement in Gloucester by paying seven years' taxes; this fund to be called the poor widows' fund, and to be under the control of the overseers of the poor, who shall make a yearly report of how the fund stands.

"11. After the death of my wife, I give my trustee leave to sell all of my real estate, except that set apart for my daughter Josephine, the proceeds of which is to pay the following legacies, to wit:

"12. I give to the trustees of the Home for Aged Men in Boston five thousand dollars.

"13. I give to the trustees of the Home for Aged Women in Boston five thousand dollars.

"14. I give to the trustees for the Sailors' Home or Snug Harbor, located at Quincy, Mass., five thousand dollars.

"15. I give to Seaman's Fisherman's Widow's and Orphan's Aid Society in the city of Gloucester all the rest and residue of my estate, for distribution among the widows according to their several needs, to be under the control of the trustees of the society. In case this society should be abolished before the settlement of my estate, it is then my will and order that this amount, of whatever sum it may be, is to be added to fund above called the poor widows' fund, which is now seven thousand dollars."

The trustee named in the will having died, the plaintiff was appointed trustee on June 26, 1882, and has since acted as such.

The widow of the testator died on September 29, 1883, and Josephine, his daughter, died on April 3, 1884.

Upon the death of the widow, the estimated value of the securities comprising the personal estate held by the plaintiff under the will amounted only to \$32,356.25. The amounts provided for Josephine and Mrs. Plummer were accordingly reduced *pro*

*rata*; and thereafter Josephine, during her lifetime, received twenty-five thirty-sevenths and Mrs. Plummer twelve thirty-sevenths of the income of these securities.

The plaintiff, acting under article 11 of the will, has sold all the real estate, except that set apart for Josephine, for the sum of \$9043.30; and the personal estate held by the plaintiff under the will has depreciated since the death of the widow, and is now insufficient in amount to satisfy in full the claims made by the several defendants.

*B. F. Brooks & H. G. Nichols*, for the granddaughter.

*M. J. McNeirny*, for Gloucester.

W. ALLEN, J. The will provided that, at the death of the testator's widow, two funds should be set apart from the personal property, made a specific devise of a parcel of real estate, and gave the trustee power to sell the residue, "the proceeds of which is to pay the following legacies, to wit:" and then gave three legacies of equal sums. There was a deficiency of the proceeds of the real estate, and a smaller deficiency of the personal estate; and the three legatees contend that they have a right to contribution from the personal estate. It seems the plain intention of the testator, that the three legacies shall be paid only out of the proceeds of the real estate, and that the other legacies shall not be diminished by contributing to make up a deficiency in the proceeds of the real estate. The estate was all given in trust for the benefit of the testator's widow during her life, and after her death \$25,000 of the personal property was to be set apart for the benefit of the testator's daughter during her life, and \$12,000 for the benefit of the testator's granddaughter during her life. At the death of the daughter, certain real estate, which was given to her for her life, was given to the city of Gloucester in fee, "and also \$20,000 added to it" for specified purposes. At the death of the granddaughter, \$5000 of the \$12,000 set apart for her use was given to the city of Gloucester for specified purposes, and "the other seven thousand dollars of this twelve" was given to the same city for other purposes. There was no other legacy except residuary.

At the death of the widow, the personal property amounted to a little over \$32,000, and it has since been managed by the trustee as a single fund, and proportionate parts of the income

paid to the daughter and granddaughter. The daughter has now deceased, and the fund has depreciated, so that it is not sufficient to pay the \$12,000 directed to be set apart for the use of the granddaughter and the legacy of \$20,000 to the city of Gloucester. The granddaughter contends that she is entitled to have the full amount of \$12,000 set apart for her use. The city of Gloucester contends that it is entitled to \$20,000 from the personal property of which the daughter had the income, or to the whole of such property, if it does not exceed that sum. The claim of the granddaughter is, that the legacy for her benefit has priority over the legacy to the city of Gloucester; and the claim of the city is, that the legacy to it is a specific legacy of the fund ordered to be set aside for the benefit of the daughter, to the amount of \$20,000. We do not think that either position can be sustained.

The legacy of \$20,000 to the city of Gloucester is not a specific legacy. The argument for holding it to be specific in effect, though general in terms, is certainly strong. It is argued that the testator intended that his estate should be settled at the death of his widow; that he in effect specifically divided his real estate, and provided for two funds to be created out of his personal estate, and bequeathed the residue; that no disposition of the funds, after the deaths of persons for whose life use they were respectively held, was made except by the several legacies to the city of Gloucester; that one fund was specifically bequeathed by two legacies amounting to and referring to the whole fund; that the legacy of an amount less than the other fund, to take effect at the time when that fund would be set free by the death of the life beneficiary, could be intended to be paid only out of that fund, and must be taken to be a specific legacy of so much of it; that to hold that the legacy is general might involve two settlements and two distributions of the estate, one on the death of the widow, which would be necessary in any event, and one on the death of the daughter, if she survived the widow and the fund then set free should be insufficient to pay the legacy; and that the natural and reasonable construction, in view of all the provisions of the will, is that all the legacies to the city of Gloucester are in the nature of remainders in the respective funds.



When a testator has disposed of all his estate, except a particular fund to come into possession upon the happening of a future event, and gives a pecuniary legacy less than the fund, to be paid on the happening of that event, the intention that the legacy shall be paid only out of that particular fund, and that the other dispositions of the estate shall not be disturbed by it, may well be inferred. In that sense, the legacy in question may be said to be specific after the creation of the fund, as payable only out of it. The intention that the legacy shall be paid in full, if the estate is sufficient, may also be inferred, as in regard to all legacies. But the question presented is, whether there is an intention shown that the legacy shall be paid in full when the estate is deficient, — whether the implied reference to the fund is an appropriation of it so as to exclude others, in the event, not contemplated, of a deficiency of the estate. We are not finding an intention by construing language expressly referring to the fund, but we are inferring an intent from an implied reference to the fund. It is only the fact that the other legacies are supposed to be paid, and the fund to be undisposed property but for this legacy, from which the intent to make it payable out of the fund is inferred. But when the other legacies have not in fact been paid, there is no ground for inferring an intent that they shall not be charged upon the fund proportionally with the particular legacy. For illustration, suppose specific legacies, including a fund for the benefit of A. during his life, and a general legacy to B., and a pecuniary legacy to C. on the death of A. The intention that, if the estate is exhausted in paying the legacies for A. and B., the legacy to C. shall be paid only out of the fund which will become available therefor on the death of A. may well be inferred; but the intention that, if the estate is insufficient to pay the legacies to A. and B., the legacy to C. shall be paid in full out of the fund, on the death of A., to the exclusion of the legacy to B., cannot be inferred. The legacy to B. is as truly a charge upon the fund expectant at the death of A., as is the legacy to C. It is payable presently, and therefore out of that part of the estate in possession, and may be said to be in that respect a demonstrative legacy, and, when paid, it is of course no charge on the expectant estate. But it is not a specific legacy of the estate in possession, but a general legacy

chargeable upon the general estate, of which the fund in expectancy is a part. If the part of the general estate presently available is not sufficient to pay it, its right to share in the future interest proportionally with the legacy payable *in futuro* survives and attaches to that interest when it becomes distributable.

In the case at bar, the legacy of the fund for the granddaughter was chargeable upon the reversion of the fund for the daughter. If the \$32,300, which was the amount of the estate at the death of the widow, had been kept good, though the granddaughter would have been entitled to but \$10,500 during the life of the daughter, there can be no doubt that, after her death and the payment of the \$20,000 to the city of Gloucester, the granddaughter would have been entitled to make up the deficiency in her fund from the balance of the \$21,800 which had been the fund for the daughter, in preference to the residuary legatee. The whole reversion of the fund for the use of the daughter is general assets, to be applied as such when it becomes available. The legacy to the city of Gloucester is general in terms, and the fact that it is, by construction, payable only out of the reversion does not show any intention to prefer it to the legacy for the granddaughter. It would not be according to the intention of the testator to require the legacy for his granddaughter to contribute in the same amount to make up the deficiency in the legacy of \$25,000 for his daughter and that of \$20,000 to the city of Gloucester. To hold that the latter is a specific legacy of the fund for the daughter, would not only defeat the apparent intention of the testator in regard to the granddaughter, but also in regard to the different legacies to the city. There is no intention shown to give a preference to this legacy to the city over the others; but the effect of holding it to be a specific legacy of the remainder of the fund would work this result in case of a deficiency, and give to that legacy twenty-five thirty-sevenths of the estate, instead of twenty thirty-seconds, which is the proportion which must be taken to have been intended.

It is contended for the granddaughter, that the legacy for her benefit is preferred to that to the city of Gloucester, and should be paid in full before anything is paid upon the latter. No such intention appears in the will. The legacies are both general in

terms, and the circumstances that one is payable presently on the death of the widow, and is for the benefit of a relation, and the other is not payable until the happening of an event which may be future, and is for a charity, are not sufficient to show an intention that the former shall be preferred to the latter. The legacy to Gloucester is in no sense a residuary legacy, and the rule that legacies, when a different intention is not shown, must abate proportionally in case of a deficiency, must apply. See *Richardson v. Hall*, 124 Mass. 228, 233.

On the whole, we think that the intention of the testator, as manifested in his will, will be best carried out by treating the legacy of \$20,000 to the city of Gloucester as a general legacy, and the fund for the use of the daughter as general assets after her decease, as would plainly have been the construction had the daughter died before the widow.

The property has depreciated since the decease of the widow, so that it is insufficient to pay the legacy to Gloucester and that for the benefit of the granddaughter in full, although it was sufficient at that time. As the funds have never been set apart, the deficiency must be considered as applying to the whole estate constituting both funds; that is, the personal estate existing at the death of the daughter must be divided proportionally, twenty thirty-seconds to be applied on the legacy of \$20,000 to the city of Gloucester, and twelve thirty-seconds to the fund for the granddaughter.

*Ordered accordingly.*

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### GEORGE W. COBURN *vs.* MIDDLESEX COMPANY.

Middlesex. Nov. 20, 1885. — July 8, 1886. DEVENS & GARDNER, JJ.,  
absent.

A. and B. entered into an indenture, by which A. granted to B., his heirs and assigns, the right to build a mill or mills, and the "privilege to draw and use the water from the mill-pond above said dam for the purpose of carrying said mill or mills;" and A. reserved to himself, his heirs and assigns, "the first and exclusive right to the use of sufficient water from said pond to carry a fulling-mill and three breast-wheels each twelve feet in diameter and fifteen feet in length, with the machinery and works that may be attached to or connected

with the same." A., for himself, his heirs and assigns, covenanted that he would maintain and keep the mill-dam in good repair, and would erect and keep a flume in repair; and that he and his heirs and assigns "will not draw or use any of the water from the aforesaid mill-pond when there is not sufficient head of water in said pond to carry a fulling-mill and three breast-wheels as aforesaid." *Held*, on a bill in equity by a person claiming under B., to restrain a person claiming under A. from removing the breast-wheels and substituting therefor turbine wheels, that the indenture did not restrict A. and those claiming under him to the use of breast-wheels, but that the terms of the reservation, so far as they referred to breast-wheels, were intended to describe the quantity of water the use of which was reserved; and that the bill could not be maintained.

**BILL IN EQUITY** to restrain the defendant from removing three breast-wheels, which furnish motive power to its mills, and substituting therefor other wheels of a different construction, namely, turbine wheels. The case was heard by *Holmes, J.*, upon the bill, answer, and agreed facts; and reserved for the consideration of the full court. The facts appear in the opinion.

*E. M. Johnson*, for the plaintiff.

*P. Webster*, for the defendant.

**FIELD, J.** By an indenture of May 31, 1821, between Hurd and How, Hurd granted to How, his heirs and assigns, the right to build a mill or mills on the Concord River, and the "privilege to draw and use the water from the mill-pond above said dam for the purpose of carrying said mill or mills;" and he reserved to himself, his heirs and assigns, "the first and exclusive right to the use of sufficient water from said pond to carry a fulling-mill and three breast-wheels each twelve feet in diameter and fifteen feet in length, with the machinery and works that may be attached to or connected with the same." Hurd, for himself, his heirs and assigns, covenanted that he would maintain and keep the mill-dam in good repair, would erect a flume near the east end of the dam, and keep it in repair, and that he and his heirs and assigns "will not draw or use any of the water from the aforesaid mill-pond when there is not sufficient head of water in said pond to carry a fulling-mill and three breast-wheels as aforesaid."

The defendant claims under Hurd, and has his rights as reserved in this indenture; the plaintiff claims under How, and has the right to use "one twenty-fourth part of the water privilege conveyed to said How by said Hurd, and subject to the reservations and conditions as contained in said indenture."

The plaintiff avers that the motive power of the defendant has heretofore been furnished by three breast-wheels, but that the defendant threatens to remove the breast-wheels and put in place of them turbine wheels; and he prays that the defendant may be restrained from making "the aforesaid changes or alteration of its said wheels." The defendant admits that it does intend to remove its breast-wheels, and to substitute others therefor of a different kind, and contends that "it has the right to make any change in its wheels, provided that, by so doing, it does not use more water than is sufficient to carry a fulling-mill and three breast-wheels of the dimensions as given in said indenture," &c.

We think it clear that the indenture does not restrict Hurd and those claiming under him to the use of breast-wheels, but that the terms of the reservation, so far as they refer to breast-wheels, are intended to describe the quantity of water the use of which is reserved. It is not agreed as a fact, and we do not judicially know, that it is impossible to measure the quantity of water and the head of water sufficient "to carry . . . three breast-wheels each twelve feet in diameter and fifteen feet in length, with the machinery and works that may be attached to or connected with the same." There may be more difficulty in measuring the quantity or head of water sufficient to "carry a fulling-mill," but all the facts are not before us which might be competent in determining the construction that should be given to this part of the reservation. On the case as it stands, we cannot attempt to regulate the use of the water by the defendant, or to determine the effect of the acts and usages of the parties upon the quantity of water each is entitled to use. We can find nothing in the facts as expressly agreed, or as admitted by the pleadings, that prevents the defendant from substituting turbine or other wheels for breast-wheels; and this is all that we are now called upon to decide. The fact that the city of Boston took part of the waters of Sudbury River, which is a "feeder to the Concord River," is immaterial upon this question.

*Bill dismissed.*

ALBERT W. NICKERSON *vs.* JOSEPH M. ENGLISH.

Suffolk. Jan. 12, 13. — July 3, 1886. DEVENS & GARDNER, JJ., absent.

A. signed a subscription paper, whereby he and the other subscribers agreed to contribute the amounts set opposite their names for the purpose of purchasing the property of a mining corporation. As part of the same transaction, the promoter of the scheme secretly agreed, on behalf of the corporation, to give A. a certain number of shares of stock free of cost. This was to induce A. to be a subscriber, and to influence others to sign; and some of those who afterwards subscribed were in part induced to do so by seeing that A. was a subscriber. Subsequently, the scheme was given up, because enough subscribers were not obtained to buy the entire property, and another scheme was set on foot by the promoter, by which the persons who signed the former paper were to take shares of stock in the company. A. refused to have anything to do with it unless he could have the same advantage he would have derived had the prior arrangement been carried out; and the promoter agreed to this. No new papers were drawn up, and A. acted with the other subscribers to the original paper in carrying out the new scheme, apparently on an equality with them, and intending that his subscription should be used to secure this result. *Held*, in an action brought by A. against the promoter of the scheme to recover the value of the shares of stock secretly bargained for, that these facts would warrant the jury in finding that the new secret agreement was void as in fraud of the other subscribers.

CONTRACT. Writ dated May 27, 1881. The declaration alleged that, on or about November 26, 1880, the defendant agreed that, if the plaintiff would pay him \$10,500, he would deliver to the plaintiff forty-five hundred shares of stock in the Napa Consolidated Quicksilver Mining Company; that the plaintiff paid said sum to the defendant, and received from him three thousand shares of said stock; and that the defendant refused to deliver the remaining fifteen hundred shares.

The answer contained a general denial, and, in addition to other defences which need not now be stated, averred "that, if any such contract or transaction as is alleged was ever made or entered into between the plaintiff and the defendant, said contract was illegal and void, and was a fraud upon other purchasers of said stock."

At the trial in the Superior Court, before *Brigham*, C. J., the evidence tended to show that, in May, 1880, the defendant, who at that time owned a large amount of stock in the Napa Consolidated Quicksilver Mining Company, and who assumed to be able to control the rest of the stock, made an arrangement with one

Landers to assist him in selling the entire stock of the company. They employed the firm of Humbert and Company, mining engineers in Boston, consisting of Pierre Humbert, Jr. and John R. Humbert, as agents to sell the stock. They drew up a subscription paper, dated August 5, 1880, which was signed "Napa Consolidated Quicksilver Company, per Humbert & Co., Agents," the terms of which appear in the opinion. The plaintiff was the second subscriber on this paper, to the amount of \$10,500, and Pierre Humbert, Jr. obtained his subscription by giving him an agreement, dated August 7, 1880, signed in the name of the "Napa Consolidated Quicksilver Company, per Humbert & Co., Agents," and which was in these words: "This is to certify that A. W. Nickerson is entitled to fifteen hundred shares Napa Con. Quicksilver Co. above his subscription free of cost on placement of property."

There was conflicting testimony as to how far the scheme represented by the subscription paper of August was abandoned. There was evidence that at a certain time the defendant told Humbert and Company that the subscription paper must be withdrawn or abandoned, and that from that time forward shares in the capital stock of the company were to be disposed of instead of taking subscriptions for the purchase of the property of the company; and Pierre Humbert, Jr. testified that the plaintiff said to him: "You need not expect me to take and buy any shares in the new arrangement, unless you carry out the old agreement. I won't pay my money in unless that be understood." The witness further testified, that he reported this to the defendant, and the defendant authorized him to see the plaintiff, and say to him, that, if he would pay immediately \$10,500, the defendant would give him forty-five hundred shares of stock; and that he told this to the plaintiff. The defendant denied that he said so to Humbert. On November 22, the plaintiff paid \$10,500, and received a certificate of three thousand shares of stock, together with \$1200, the amount of dividends declared by the company from August 5 to November 26 on said three thousand shares.

The jury returned a verdict for the plaintiff, in the sum of \$5906.25; and the defendant alleged exceptions, which appear in the opinion.

*N. Morse & E. W. Hutchins*, for the defendant.

*R. D. Smith & C. A. Prince*, for the plaintiff.

FIELD, J. The defendant relies upon his exceptions to the exclusion of evidence offered by him, and to the refusal of the judge to give the instructions to the jury which he requested.

Whether the agreement of August 5, 1880, was ever binding upon the Napa Consolidated Quicksilver Company or not is, we think, immaterial, because the action is not against the company, or on that agreement. It may be, as the judge below suggested, that there was no evidence that the defendant was authorized by that company to execute any such agreement in its name, either by himself or by any agents he might appoint. That paper is material only so far as it entered into the agreement for the purchase and sale of stock which was actually carried out. By the agreement of August 5, the company was to sell all its corporate property for the sum of \$350,000, and the subscribers agreed to pay the sums set against their names, provided the title to the property was clear and unincumbered, and its condition and value were found to be as set forth in certain reports; and provided also that all the moneys then in the treasury of the company, or thereafter received, should be paid over to the subscribers as a part of the purchase. The subscribers also agreed "that in all things necessary for the fulfilment of this agreement herein set forth, and for the future management of the property, the action of a majority in interest of their number shall be binding." Nineteen persons, of whom one signed twice, subscribed to this agreement, each for a definite sum of money, in all amounting to \$124,000, and two other persons subscribed for shares, in all amounting to five thousand shares, and there was an additional subscriber, the last, who subscribed \$3500. It is said that the last three subscribed after it was decided by the defendant that no more signatures to the agreement were to be obtained.

The company was a corporation organized under the laws of the State of California, with a capital stock of one hundred thousand shares of the par value of \$100 each. The plaintiff subscribed the agreement for \$10,500, and was the second subscriber; and, at the time he subscribed, he received the agreement dated August 7, 1880.



The plaintiff declares on an oral agreement, alleged to have been subsequently made with the defendant, to buy of him forty-five hundred shares of stock for \$10,500. It is not denied by the defendant, that the attempt to obtain additional subscriptions to the original agreement ceased before the requisite number of subscribers had been obtained, and that he directed that it should no longer be circulated for subscriptions, because he did not want to give new subscribers the back dividends. The plaintiff contends that the whole original scheme was abandoned by all the parties to it, and that an independent attempt was made to sell shares of stock in the company, subject of course to a delivery of the control to the Boston parties or no sale, and that this was the only arrangement ever carried into effect.

There was evidence that the new arrangement for selling stock was that it was to be sold at \$3.50 per share, and that the subscribers to the original paper who took shares at that price were to receive the back dividends, but that new subscribers to stock were not. There was also evidence that the plaintiff refused to take stock under this arrangement unless the agreement with him of August 7, 1880, was carried out, and that the defendant authorized Humbert to promise that this should be done, or that the plaintiff should receive forty-five hundred shares for \$10,500, and that Humbert made this promise to the plaintiff, and thereupon the plaintiff paid \$10,500 and received three thousand shares of stock with the back dividends, and now sues to recover the value of fifteen hundred shares which the defendant refuses to convey to him.

The defendant's contention is, that the original subscription paper was not abandoned, but that it was orally agreed between the subscribers to it, that, instead of attempting to obtain subscriptions to the full amount, and then taking a transfer of all the property of the corporation, the subscribers should take stock to the extent of their subscription at \$3.50 per share, and receive the back dividends, and that other persons should be induced to buy stock, at \$3.50 a share, until a controlling interest in the stock was sold; that this arrangement was carried out; and that the plaintiff is suing upon the original agreement for fifteen hundred shares as modified by this change, and that the alleged new promise of the defendant was a promise to perform

the original agreement of August 7, as modified by the new arrangement.

The charge of the presiding judge is directed to two questions, namely, whether Humbert on behalf of the defendant made the oral promise declared on, and, if so, whether he was authorized to make it by the defendant; and he considers the original subscription paper as abandoned, and treats that and the original agreement for fifteen hundred shares as of no legal effect upon the rights of the parties.

The plaintiff never signed any other agreement than the original agreement of August 5, and there is no evidence that any of the other subscribers ever signed any other agreement. There was evidence for the jury, that the agreement of August 7 to give the plaintiff fifteen hundred shares of stock was a secret agreement made by the defendant's authority, as the consideration of the plaintiff's signing the agreement to purchase the property of the corporation, apparently on equal terms with the other subscribers, and for thus allowing the use of his name as an inducement to other persons to sign it, and that some did sign it in ignorance of this secret agreement, and influenced more or less by the fact that the plaintiff had signed it. It is not seriously controverted by the plaintiff, that, if the subscription paper had been completed and the plaintiff had brought suit on the agreement of August 7 to give him fifteen hundred shares, there was evidence for the jury that the agreement was illegal and void as against public policy. The real contention of the plaintiff is, that the contract on which he sues was a new and independent contract, made with the defendant and not with the company; that the construction of the written agreements of August 5 and 7 was for the court, and that they both purport to be agreements with the company, and not with the defendant; that the agreement of August 7 was conditional upon "the placement of the property;" that it was conceded that the agreement of August 5 was never signed by the requisite number of subscribers, and was never carried into effect, and that the property was never "placed," within the meaning of the agreement of August 7; that, as matter of law, after the attempt to carry into effect the agreement of August 5 according to its terms was abandoned, no one of the subscribers was legally

bound to purchase any stock of the defendant, and that, if any did so, they made their own terms; and that there was no evidence that the plaintiff authorized the use of his name as a lure or inducement to other persons to buy stock of the defendant, or that he ever signed with others any agreement to buy stock of the defendant, which could have been shown to any person, or, if the old subscription paper was used to induce persons to buy stock, that he authorized this use of the paper, or that it was a use of the paper which was contemplated when he signed it, or which he could be presumed to have anticipated and intended.

We think the court was right in treating the agreement to take stock as a new agreement, which would not be binding on the subscribers to the old agreement unless they actually assented to it, and that it was competent for the parties to agree upon any price for the stock they saw fit; and that, if this were all, no illegality was shown in the contract on which the suit is brought. It is only on the ground that the plaintiff was acting with others in a matter of common interest, and apparently upon an equality with them, and that his signature was used, and intended to be used, to induce other persons to sign the common agreement, that the secret promise for his advantage can be declared void. *Harvey v. Hunt*, 119 Mass. 279. *White Mountains Railroad v. Eastman*, 34 N. H. 124. *Melvin v. Lamar Ins. Co.* 80 Ill. 446. *Robinson v. Pittsburg & Connellsville Railroad*, 32 Penn. St. 334. *Miller v. Hanover Junction & Susquehanna Railroad*, 87 Penn. St. 95. *Henry v. Vermillion & Ashland Railroad*, 17 Ohio, 187. *Stanhope's case*, L. R. 1 Ch. 161.

But a new agreement may be so connected with the original secret agreement as to be tainted with the same illegality. It has been said that, to have this effect, "the connection must be something more than a mere conjunction of circumstances into which the unlawful transaction enters, so that without it there would have been no occasion for the agreement. It must amount to a unity of design and purpose, such that the agreement is really part and parcel of one entire unlawful scheme." Pollock on Contracts, 325, and cases cited. Although the change from the agreement to buy the property of the company to that of buying stock in it was something more than a modification of the original agreement in matters of detail, or in matters

relating to the time or manner of performance, and although the original agreement never became obligatory upon the subscribers, because it was subject to the implied condition that it should not take effect until subscriptions sufficient for the purchase of the whole property of the corporation were obtained, and although the effect of refusing to permit further subscriptions to it was in legal effect abandoning it, yet it might have been incorporated into the new agreement, if the parties to that agreement so determined. If the new agreement to purchase stock from the defendant was substituted for the original agreement to purchase the property of the corporation by the consent of the subscribers, of whom the plaintiff was one, with the understanding that their rights as among themselves were substantially the same as expressed in that agreement, and this change was promoted by the plaintiff or by his authority, and the new arrangement was actually carried into effect, it should have been left to the jury to determine whether both the new and the old promise for a secret advantage were not void, as made in fraud of the rights of the other subscribers who became purchasers of stock. Every subscriber to the agreement to buy the property was at liberty to refuse to take stock, and unless he was induced to take it by the original subscription of the plaintiff, and by the representations of the plaintiff that he assented to the change made and was taking stock on equal terms with the others, no fraud has been practised upon the subscribers.

The offer of evidence by the defendant did not include any offer to show that the plaintiff, by himself or his agent, expressly represented to the other subscribers that he would take stock with the others to the amount of his original subscription, and that they took stock on the faith of this representation. But the offer of evidence, with the evidence admitted, was broad enough to include evidence that the plaintiff agreed with the other subscribers to take stock, instead of the property, to the extent of his subscription, at \$3.50 a share, after deducting the back dividends, and upon the basis, as among themselves, of the original subscription. If all the evidence offered had been admitted, there was evidence for the jury that the plaintiff, by himself or his agent, acted with the other subscribers, and apparently upon an equality with them, in effecting the arrangement

whereby they took stock to the extent of their subscriptions, and that he intended that his subscription should be used for the purpose of securing this result.

We think that the case was tried too narrowly, and that, in addition to the evidence relating to the original agreement to give him fifteen hundred shares, evidence should have been admitted tending to show that the plaintiff, personally or by his agent, agreed, expressly or impliedly, with the other subscribers, that he would act with them in taking stock on the basis of the original agreement to buy the property, and that he and Pierre Humbert, Jr., so far as he acted for the plaintiff, understood that the plaintiff's subscription was to be used for the purpose of inducing the other subscribers and other persons to buy stock under the new arrangement, when it was insisted that the defendant should promise that he would give the plaintiff the same advantage as was promised in the first secret agreement.

*Exceptions sustained.*



WILLIAM MINOT, JR. & others *vs.* CITY OF BOSTON  
& another.

Suffolk. Jan. 20. — July 3, 1886. MORTON, C. J., DEVENS & GARDNER, JJ., absent.

The power conferred by the St. of 1846, c. 167, § 11, and the St. of 1861, c. 106, § 18, upon the city council of Boston and Charlestown respectively to appropriate the surplus income arising from water rates to a sinking fund, and which, by the St. of 1875, c. 80, and an ordinance passed in pursuance thereof, became vested in the Boston Water Board, is not taken away by the St. of 1875, c. 209 (Pub. Sts. c. 29).

PETITION, under the St. of 1846, c. 167, § 18, filed January 29, 1885, by one hundred and nineteen legal voters of Boston for the appointment of three commissioners, who, upon due notice to the parties, might, if they should think proper, reduce the prices for the use of water fixed by the Boston Water Board.

The case was heard by *W. Allen, J.*, and reserved for the consideration of the full court; and appears in the opinion.

*J. L. Stackpole*, for the petitioners.

*A. J. Bailey*, for the respondents.

FIELD, J. By the St of 1846, c. 167, § 9, the city council of the city of Boston was authorized to issue, "from time to time, notes, scrip, or certificates of debt, to be denominated, on the face thereof, 'Boston Water Scrip,' to an amount not exceeding, in the whole, the sum of three millions of dollars, bearing interest," &c.; and, by § 10, to issue, in addition to this sum of three millions of dollars, whenever and so far as might be necessary, "notes, scrip, or certificates of debt, in the manner prescribed in the preceding section, to meet all payments of interest which may accrue upon any scrip by them issued; provided, however, that no scrip shall be issued for the payment of interest as aforesaid, after the expiration of two years from the completion of said aqueducts and other works; but payment of all interest that shall accrue after that time shall be made from the net income, rents, and receipts for the use of the water, if they shall be sufficient for that purpose; and if not, then the payment of the deficiency shall be otherwise provided for by the city council." By § 11, "the city council shall, from time to time, regulate the price of rents for the use of the water, with a view to the payment, from the net income, rents, and receipts therefor, not only of the semiannual interest, but ultimately of the principal also of the 'Boston Water Scrip,' so far as the same may be practicable and reasonable. And the said net surplus income, rents, and receipts, after deducting all expenses and charges of distribution, shall be set apart as a sinking fund, and shall be appropriated for and towards the payment of the principal and interest of the said scrip," &c. By § 12, if, at any time after two years from the completion of the works, "the surplus income and receipts for the use of the water distributed under the provisions of this act, at the price established by the city council, after deducting all expenses and charges of distribution, shall, for any two successive years, be insufficient to pay the accruing interest on the said scrip, then the Supreme Judicial Court, on the petition of one hundred or more of the legal voters of said city, praying that the said price may be raised and increased so far as may be necessary for the purpose of paying, from the said surplus income and receipts, the said accruing interest, . . . may appoint three commissioners, who . . . may raise and increase the said price, if they shall judge proper, so far as may be necessary, in their judgment,

for the purpose aforesaid, and no farther," &c. By § 13, "If the surplus income and receipts for the use of the water, distributed under the provisions of this act, at the price established by the city council, after deducting all expenses and charges of distribution, shall, for any two successive years, be more than sufficient to pay the accruing interest on the 'Boston Water Scrip' hereinbefore mentioned, then the Supreme Judicial Court," on a similar petition, "may appoint three commissioners, who . . . may, if they shall judge proper, reduce the price established by the city council; provided that such reduction shall not be so great that the surplus income and receipts aforesaid will, in the judgment of the said commissioners, be thereafter insufficient for the payment of the said accruing interest." It is under this last section that this petition is brought. By subsequent statutes the city was authorized to issue additional amounts of scrip.

By the St. of 1861, *c.* 105, the city of Charlestown was authorized to take the waters of Mystic Pond, &c., to regulate the use of the water and "establish the prices or rents to be paid for the use thereof;" and by § 11 the city council was authorized to issue scrip, &c., and by § 13 it was provided that "the city council shall, from time to time, regulate the price or rent for the use of the water, with a view to the payment, from the net income and receipts, not only of the semiannual interest, but ultimately of the principal of said debt so contracted, so far as the same may be practicable and reasonable." The subsequent acts giving additional power to the city of Charlestown need not be noticed, except that the St. of 1871, *c.* 159, § 2, provides that "the income derived from water rates, under the several acts authorizing the construction and extension of water works in said city, after deducting cost of maintenance, and interest on the water bonds, shall be applied to the reduction of the water debt, and shall not be used for any other purpose whatever," and a similar provision is contained in the St. of 1872, *c.* 85, § 2.

The cities of Boston and Charlestown were united by the St. of 1873, *c.* 286, and by § 12 the Mystic Water Board established in Charlestown continued to be a separate organization from the Cochituate Water Board established in Boston "until the said city council shall determine to unite it with the Cochituate Water Board of Boston."

By the St. of 1875, c. 80, the city council was authorized to establish the Boston Water Board, and to confer upon that board the powers granted to the city by the statutes "with reference to supplying said city with water," and the powers of the Co-chituate and Mystic Water Boards; and by § 1 "said board may also establish and regulate the price or rents for the use of said water, subject to the provisions of" the St. of 1846, c. 167, §§ 12, 13, "and the words 'Boston Water Scrip' in said sections shall be construed to include the whole amount of outstanding loans representing the cost of the water works;" and by § 2 the Co-chituate Water Board and the Mystic Water Board were, upon the appointment of the Boston Water Board, abolished. This Boston Water Board was established by the city council of the city of Boston by an ordinance passed March 22, 1876, and it may be assumed that, pursuant to the St. of 1875, c. 80, § 1, the powers conferred upon the city of Boston by the St. of 1846, c. 167, and the acts in addition thereto, and upon the city of Charlestown by the St. of 1861, c. 105, and the acts in addition thereto, and upon the city councils, respectively, of these cities, were, with limitations not material to be here noticed, delegated to the Boston Water Board, and that the regulation of the water rates for the whole water supply of the city, after the two cities were united, was thus put under the control of the Boston Water Board, subject to the power reserved to the city council, and to the provisions of the St. of 1846, c. 167, §§ 12, 13.

At the argument, perhaps in consequence of a change in the water rates made after the petition was filed, the petitioners waived all their complaints but one, which, as stated in the report, is "that the sums paid from the current water rates of each year for creating a sinking fund for the extinguishment at maturity of such part of the Boston water scrip as was issued subsequently to the passage of the municipal indebtedness act of 1875 were improperly and illegally taken."

The St. of 1875, c. 209, has been incorporated into the Pub. Sts. c. 29. By § 9 of this chapter, it is provided that "The interest on all debts shall be raised by taxation annually. When a debt is payable at a period exceeding ten years, the city or town shall, and when payable at a period not exceeding ten years may, at the time of contracting the same, establish a sinking



fund, and contribute thereto from year to year an amount raised annually by taxation sufficient with its accumulations to extinguish the debt at maturity; and, when payable at a period not exceeding ten years, the city or town shall raise by taxation annually not less than eight per cent of the principal thereof, and shall set apart the same for a sinking fund until an amount is raised sufficient with its accumulations to extinguish the debt at its maturity; and shall raise any balance necessary for such extinguishment, by taxation, in the year before the maturity of the debt," &c. Section 14 provides as follows: "Nothing contained in the first seventeen sections shall be construed as prohibiting the inhabitants of towns, or city councils, from paying or providing for the payment of any debts at earlier periods than is therein required; . . . or from adding to any sinking funds . . . any sums derived from taxation or other sources, which are not required by law to be otherwise expended; and such additions may be made for the purpose of reducing the entire debt for the redemption of which the sinking fund was established, or of reducing the amount to be raised by taxation for such fund."

By the Pub. Sts. c. 11, § 34, "The assessors shall each year assess taxes to an amount not less than the aggregate . . . of all sums which are required by law to be raised by taxation by the said cities or towns during said year; . . . and the assessors may deduct from the amount required to be assessed the amount of all the estimated receipts of their respective cities or towns (except from loans or taxes) which are lawfully applicable to the payment of the expenditures of the year, but such deduction shall not exceed the amount of such receipts during the preceding year." It is not necessary to decide that in the expenditures mentioned in this section are included the contributions to sinking funds which towns and cities are required each year to make, however much might be said in favor of such a construction, because the Pub. Sts. c. 29, § 14, enact that city councils may provide for the payment of debts at earlier periods than is in that chapter required, and may add to any sinking funds any sums derived from other sources than taxation "for the purpose of reducing the entire debt for the redemption of which the sinking fund was established," as well as for "reducing

the amount to be raised by taxation for such fund." There is nothing in the St. of 1875, c. 209, or in the Pub. Sts. c. 29, that indicates that the Legislature intended to repeal any of the provisions relating to the establishment of water rates contained in the St. of 1846, c. 167, and the St. of 1861, c. 105, and both these acts, as well as many other acts passed for supplying other cities with pure water, provide that the city council shall regulate the price or the rent for the use of the water with a view to the payment from the net income, not only of the semiannual interest, but ultimately of the principal of the water debt. The different provisions of the statutes may well stand together; the St. of 1875, c. 209, gives greater security to the holders of the indebtedness that it will be paid at maturity, but there is nothing in it inconsistent with the policy of making the water rates extinguish the debts incurred in procuring a supply of water.

It may also be assumed, without deciding, that the provisions for a petition to the Supreme Judicial Court found in the St. of 1846, c. 167, §§ 12, 13, although not found in the St. of 1861, c. 105, are now applicable to all water rates established by the Boston Water Board, because by the St. of 1875, c. 80, the board in establishing rates is expressly made subject to these provisions. By these sections of the St. of 1846 the Legislature apparently intended that the rates established should be sufficient, after deducting all expenses and charges of distribution, to pay the accruing interest on the water debt unless both the city council and the commissioners established a lower rate; but that if for two successive years the rates should be more than sufficient for this purpose, then the commissioners to be appointed by the Supreme Judicial Court might, if they judged proper, reduce the rates, but not so that the surplus income should be insufficient to pay the accruing interest on the debt. The argument was not pressed that the court must necessarily appoint commissioners, if it were shown that for two successive years the income and receipts for the use of the water, after deducting all expenses and charges of administration, were more than sufficient to pay the accruing interest of the water debt, although that question is reserved in the report. The learned counsel for the petitioners apparently desired to raise only the question whether payments can lawfully be made out of the water rates to the

sinking fund for the redemption of bonds issued since the passage of the St. of 1875, c. 209.

It is not, perhaps, very significant, that the words of the St. of 1846, c. 167, §§ 12, 13, are, that the court may appoint commissioners, and not that it shall appoint them. These sections, however, provide that the award of the commissioners, on "being returned to the said court, at the then next term thereof for the county of Suffolk, and accepted by the said court, shall be binding and conclusive, for the term of three years," &c. Some judicial power, therefore, the court has over the award before it can become binding, and a case might be stated in the petition, or proved at the hearing, in which the court would not feel imperatively compelled to appoint commissioners, although it were shown that for two successive years there had been a slight excess in the water rates over the expenses of distribution and the accruing interest on the debt. But as the petitioners do not insist upon maintaining their petition if the payments to the sinking fund were lawful, we do not consider the competency of the evidence offered, or the extent of the discretion which the court might exercise in determining whether commissioners should be appointed, or whether their powers and duties, if appointed, have been modified by any special legislation since the passage of the St. of 1846, c. 167.

*Petition dismissed.*

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### FANNIE M. FLAGG vs. INHABITANTS OF HUDSON.

Middlesex. March 3. — July 3, 1886. W. ALLEN & HOLMES, JJ., absent.

In an action against a town for an injury occasioned by an alleged defect in a highway, in the night-time, the plaintiff, a woman, testified that she was in a vehicle with her husband, and he was driving slowly. The husband testified that the night was dark and foggy; that he had a rein in each hand, was holding the reins tightly, and was driving down a hill as slowly as the horse could trot. There was other evidence indicating a greater rate of speed. *Held*, that the question whether the plaintiff and her husband were in the exercise of due care was properly submitted to the jury.

If a person, driving along a narrow highway in a town, on a dark and foggy night, and using due care, turns his horse to the left, in order to avoid going down an

embankment on the right of the road, which is not guarded by a railing, and comes into collision with a carriage approaching from the opposite direction, and which is on its proper side of the middle of the way, and is injured, the defect is the sole cause of the injury, and he may maintain an action therefor against the town.

TORT, for personal injuries occasioned to the plaintiff by reason of an alleged defect in a highway in the town of Hudson. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The injuries were received on April 27, 1883, at about half-past eight o'clock in the evening. Within thirty days thereafter a notice, as required by the statute, was given to the chairman of the selectmen of the defendant.

The plaintiff and her husband lived about three fourths of a mile from the place of the injury, on a road running east and west, and leading directly from their house to the village of Hudson; the injury was received at a place from eighty to one hundred feet from this road, on another road leading southerly, and nearly at right angles with the first-named road, towards Marlborough. The plaintiff's husband was well acquainted with the road on which the accident occurred, having, for a period of eighteen months prior to one year before the injuries complained of, driven twice daily over that road, morning and evening, in going to and from his work in Marlborough, and within the year had driven six or seven times over that road.

The travel from the first-mentioned road, according to the direction from which it came, entered upon the road in question by separate travelled paths, which united at a point fifty feet more or less southerly of an elm tree, and from this point there was but one travelled path by and beyond the place of the injury over a way in which there was a stone culvert covering a small brook. Each wheel-track and the track made by single horses were about one foot six inches wide, and the ground between them was not worn so much as that in the tracks. The surface of the constructed roadway was level, and from eleven and a half to twelve feet wide between the shoulders of the roadway on each side at the place where the accident occurred, and for some little distance both ways.

On the westerly side, the way sloped off gradually to a wall eight or ten feet distant, and was grassed over to the wall, on

which grass a carriage could turn out; on the easterly side the easterly wheel-track extended along by the side, and within about a foot of the easterly line, of the easterly shoulder of the way, and on that side from the shoulder the slope down was at an angle of about forty-five degrees, about as steep as gravel would stand, and the ground at the bottom of the slope was from one foot and six inches to two feet perpendicularly below the surface of the way. There was then no fence or railing on the easterly side of the way, but bushes from six to ten feet high stood by the side of, and somewhat projected over, the easterly edge of the way, except that the plaintiff offered evidence that the side of the way on each side of the culvert, and nearly to the small elm tree standing on the easterly side, was free from bushes.

The plaintiff, with her husband, left their house about seven o'clock on that evening in a light, open buggy, drawn by a horse driven by the husband, and drove over that road to the house of a neighbor about one mile southerly of and beyond the place of the injury, and remained there until after eight o'clock, and on their way home arrived near the place of the accident about half past eight o'clock. The horse was reasonably safe and gentle, and had been driven by the plaintiff. The road was descending nearly to the culvert in the direction in which the plaintiff was travelling.

The plaintiff called as a witness her husband, who testified as follows: "As I came down the hill, I was driving as slow as the horse could trot. It was dark and foggy. I had a rein in each hand and was holding the reins tightly, and as I came round the turn my wife spoke to me, and I saw a team fifteen or twenty feet from me approaching. I pulled right up, and said, 'Whoa!' and my horse turned out; at the same time, I felt my buggy tip a little towards the east, and perhaps I pulled my horse back involuntarily. As soon as I thought we were going over, I jumped to the right into the meadow. My wife soon came, and her head struck against my shoulder and knocked me down. My buggy struck against the team, which proved to be a hack drawn by two horses."

On cross-examination, he testified that his forward wheel went between the hind wheel and body of the hack, striking

the door and step, and catching on the spring; that he had driven the same horse, and it was safe and gentle.

The plaintiff testified as follows: "I and my husband were riding toward home. My husband was sitting on the right-hand side of the buggy, and was driving slowly. It was quite dark, and we were talking. I heard a team coming, and said to my husband, 'Turn out.' He turned out, the buggy tipped to the right, and as it tipped I threw out my hand to catch hold of his coat to save falling, and the hack struck us. I remember my face striking against something on the ground. I knew no more until I found myself in Mr. Stone's house."

The plaintiff also called George Flood, who testified as follows: "I owned and was driving my hack, drawn by two horses, going from Maynard towards Marlborough, and had five men as passengers inside the hack. I was sitting on the front outside seat, driving. I had passed Stone's house, was paying attention to my horses, and was going not over three or four miles an hour. My horses were just trotting, not going over four miles an hour. I was looking ahead. It was very dark, and was between eight and one quarter o'clock and eight and three quarters. After I had turned the corner and got just out of and beyond the circle going south, I felt I was a little out of the road to the right, my horses going to the right without my guiding them. I saw a flash, thought I was out of the road a little, saw a buggy with a white horse, felt a crash as if striking my hack. I afterwards learned that the white flash was the white horse. The man hollaed, 'You have killed my wife.' I got off my hack, found her in the swampy place by the side of the road, and her head within three feet of the road. She was unconscious, and I helped carry her to Stone's house. After that, I returned to the place of the injury."

On cross-examination he testified as follows: "I can't tell how fast the white horse was going. When the white horse came in sight of me, it was side of my box on which I was driving. I could not see it was a horse; it was something white."

It appeared in evidence, from these and other witnesses, that the horse and buggy did not go down the side of the way, tip over, or strike against anything on that side after the first tipping; that when the plaintiff's husband jumped, the plaintiff

followed him, striking her head on his shoulder, and thereupon both fell upon some poles; and that the injuries to the plaintiff came either from her fall upon her husband when the buggy tipped, or from the collision of the buggy with the hack. At the time of the collision, the left or nigh forward wheel of the hack had passed, going to the right of the middle of the travelled path westerly of the path or track made by the horses, and the left or nigh hind wheel of the hack had reached a point between the easterly wheel-track and the horse track.

From end to end the hubs of the hack wheels measured six feet and one inch, and the wheels made tracks five feet and three inches apart, measured from the outside of each. From end to end the hubs of the buggy wheels measured five feet four and one half inches, and the wheels of the buggy made tracks four feet eight and one half inches apart, measured from the outside of each. The buggy struck the nigh step of the hack, which was supported by an iron arm about one inch in diameter, and the forward buggy wheel locked into the hind wheel of the hack. Immediately after the collision, it was found that the arm with the step was bent up under the body of the hack, the door off its hinges, and a mark of the hub-rim under the door of the hack; and that the hind end of the hack was lying to the west, eighteen to twenty-four inches from the track, the ground torn up for that distance, both elliptic and both C springs broken, and both hind wheels and axle detached from the body of the hack, whereby the hind end of the hack, with the passengers therein, fell on the ground, and the hind wheels and axle ran some ten feet over against the wall by the west side of the road. The buggy was but slightly injured, the harness of the horse attached thereto was not broken, and the horse, uninjured, stopped just round behind the hack, with his head facing the west.

The plaintiff contended that the defect in the road was the absence of a railing; and that the want of the railing was the sole cause of the injuries. The defendant contended that the alleged defect was not the cause of the injuries; that, had a railing existed at that place, the buggy would have struck against the hack if it avoided the railing; and that the plaintiff was not in the exercise of due care by herself and her husband.

Upon the conclusion of all the evidence, the defendant requested the judge to rule that the evidence was insufficient to warrant a verdict for the plaintiff; and to direct a verdict for the defendant. The judge refused both requests.

The defendant then requested the judge to give the following instruction: "If the way was too narrow for the proper or easy passage of two vehicles upon the constructed way, going in opposite directions, and the injury to the plaintiff was caused by the carriage in which she was riding coming in collision with the hack going in the opposite direction, although such hack was where it might legally have been under the circumstances, and although the constructed way at the place of the injury was too narrow to have permitted the carriage in which the plaintiff was riding to have been turned aside so as to have avoided the hack and passed it without contact, yet the plaintiff cannot recover."

This was refused; and thereupon the defendant requested the judge to give the following instructions:

"If the injury to the plaintiff was caused by a collision with the hack, and the same at that time had not been driven to the right of the middle of the travelled path, and the injury would not have happened except for such collision on the easterly side of the middle of such path, then the alleged defect would not be the sole cause of the injury, and the plaintiff cannot recover.

"If the injury to the plaintiff was caused, not by reason of the carriage in which she, the plaintiff, was riding going off the surface of the road and partially down the slope, but by reason of its coming against the hack, the plaintiff cannot recover; nor if the injury was caused in part by a defective condition of the way and by the collision with the hack."

The judge refused to give these instructions; and instructed the jury as follows:

"Persons injured through a defect or want of repair, or of sufficient railing, in or upon a highway, which might have been remedied, or the injury from which might have been prevented, by reasonable care and diligence on the part of the town obliged to repair such highway, may recover damages sustained by such injury, not exceeding \$4000, provided such town had reasonable notice of such defect, or might have had notice thereof by the exercise of proper care and diligence on the part of such town.



“A highway is to be taken to be that part thereof adapted to travel and use, and travelled and used as a highway, and a town required to maintain such a highway must keep such travelled and used part of the highway reasonably safe and convenient for public travel at all times, and, neglecting that duty, would be responsible for the consequences to any person injured through that neglect. Towns are not required to cause these highways to be lighted by night.

“Towns are not required to maintain ways of any particular width, and they are not required to erect or maintain barriers or railings along the sides of a highway, unless there is in close proximity to the sides of a highway a dangerous place, which causes the highway, as travelled and used, to be unsafe to a person travelling there with due care. Towns are not required to erect railings along the sides of a highway, to prevent travellers from straying therefrom.

“The law has not undertaken to define at what distance in feet or in inches a dangerous place must be from the highway in order not to be in close proximity to it.

“The duty of a town to erect railings in a given place arises out of the decision of the practical question, by the good sense and experience of a jury, whether at that place travel on the highway is endangered by a dangerous place so near to the highway, in view of the width of the road, that a traveller thereon, using due care to travel within its limits, is in danger of injury by that dangerous place.

“In the case on trial the questions are, first, Has the plaintiff proved that, at the place of her injury, there was a defect in the highway, which the town of Hudson was required in law to remedy?

“By the evidence, the jury must ascertain that there was such a defect, what it was, and that it had to the plaintiff's injury the relation of cause to effect, and of sole cause and sole effect. By the instruction that the plaintiff must prove that a defect in the highway, or a dangerous place in close proximity to it, causing the highway to be practically unsafe, was the sole cause of her injury, the jury will not understand that the plaintiff must prove that her injury was caused solely by her coming in contact with a defect in the highway. The plaintiff's injury, however, must

have been caused by contact with the defect, or by a collision of her carriage with another carriage, which was inevitable, in avoiding that defect. If the plaintiff's carriage, by a defect in the highway, was practically forced into collision with another carriage, and that collision caused her injury, in legal effect the defect caused her injury; but the jury must find, to authorize such conclusion, that the plaintiff's carriage would not have come in collision with another carriage, to her injury, if there had not been in the highway a defect at the place of her injury.

"What care was exercised by the plaintiff may be ascertained by the testimony of the plaintiff and her husband, if the jury believe that they could accurately remember and have honestly related what care was exercised immediately before and at the time of her injury. It may be more decisively ascertained by the testimony of the consequences of the collision, indicating the speed of the plaintiff's carriage and the force of the collision."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

*C. Robinson, Jr. & J. T. Joslin*, for the defendant.

*W. B. Gale & S. W. Trowbridge*, for the plaintiff.

FIELD, J. Whether the plaintiff or the plaintiff's husband was in the exercise of due care was for the jury to determine.

The defendant contends that the evidence failed to show that the injury was caused solely by a defect in the way, and was insufficient to warrant a verdict for the plaintiff; that the real cause of the injury was the collision; that the last two instructions requested should have been given; and that the instructions given were not substantially the same in meaning as those requested.

We think there was evidence for the jury, that the injury was caused solely by the tipping of the buggy, and that this was caused by its wheels running over the shoulder of the road and upon the steep slope on the easterly side of it; and that this slope was of such a character, and so near to the travelled part of the road, as to make the road itself dangerous to persons travelling upon it. See *Harris v. Newbury*, 128 Mass. 321.

The exceptions find "that the injury to the plaintiff came either from her fall upon her husband when the buggy tipped, or from the collision of the buggy with the hack." Upon the

relation of the collision to the cause of the injury, the court instructed the jury that the defect must be the sole cause of the injury, but by that "the jury will not understand that the plaintiff must prove that her injury was caused solely by her coming in contact with a defect in the highway. The plaintiff's injury, however, must have been caused by contact with the defect, or by a collision of her carriage with another carriage, which was inevitable, in avoiding that defect. If the plaintiff's carriage, by a defect in the highway, was practically forced into collision with another carriage, and that collision caused her injury, in legal effect the defect caused her injury; but the jury must find, to authorize such conclusion, that the plaintiff's carriage would not have come in collision with another carriage, to her injury, if there had not been in the highway a defect at the place of her injury." If then the jury found that the injury was caused by collision with the hack, the jury must also have found that the collision was rendered inevitable in avoiding the defect, and would not have happened without it. As the jury must have found that the plaintiff was in the exercise of due care, and that there was a defect in the way which might have been remedied by reasonable care on the part of the town, of which the town reasonably had notice, the question is whether the injury was received "through" the defect, or, in other words, whether the defect was the proximate cause of the injury. If the plaintiff, in the exercise of due care, had jumped from the buggy to avoid apparently imminent danger from the position into which she had been brought by the defect, and, in so doing, had suffered the injury, she could maintain the action. *Sears v. Dennis*, 105 Mass. 310. *Williams v. Leyden*, 119 Mass. 237. *Lund v. Tyngsboro*, 11 Cush. 563.

- If the plaintiff's husband voluntarily turned the horse to the left, to avoid the danger of the buggy's tipping over, and this was done under a reasonable apprehension that the buggy would otherwise tip over in consequence of the slope which constituted a defect in the way, and the result was the collision and the injury, the defect would still be considered as the cause of the injury, if the plaintiff and her husband used due care. If the horse turned to the left without any action on the part of the driver, and this was the reasonable thing to be done in

consequence of the danger of the buggy's tipping over if he continued on his course, the same conclusion follows. The apparent danger must of course be such that the means taken to avoid it are reasonable under the circumstances. If the injury was caused by the combined effect of the defect in the way and of the negligence of the driver of the hack, the plaintiff cannot recover; but this requires that there should be two concurrent operative causes of the injury. *Kidder v. Dunstable*, 7 Gray, 104. *Rowell v. Lowell*, 7 Gray, 100.

In *Bemis v. Arlington*, 114 Mass. 507, the stones the sight of which frightened the horse were held not to be a defect in the way; and, if the ridge was a defect, it was but remotely connected with the injury.

The last two requests for instructions do not deal with the question which arises if the collision was caused by the use of reasonable means to avoid the danger caused by the defect in the way. So far as these requests were true statements of the law, they were substantially given in the charge. The plaintiff was permitted to recover only if the defect was the sole cause of the injury; or, in case the collision was the immediate cause of the injury, only if it was inevitable in order to avoid the defect, and was "practically forced" upon the plaintiff by the defect, without which the injury would not have occurred.

The instruction given, as applied to the evidence, seems to us as favorable to the defendant as an instruction that, if the plaintiff and her husband, using due care as travellers upon the highway, were, by a defect in it, exposed to imminent danger to life and limb, and, as a reasonable precaution to avoid this danger, her husband turned the horse to the left, whereby the buggy was brought into collision with the hack, which otherwise would not have happened, and thus the plaintiff suffered injury, the defect may be considered as the sole cause of the injury. The defendant did not ask for any further instructions upon the nature of the necessity which would justify the plaintiff or her husband in voluntarily incurring the risk of the collision, and we cannot say that the instructions given were misleading.

*Exceptions overruled.*

**BANK OF AMERICA vs. FAYETTE SHAW & another.**

Middlesex. March 4. — July 3, 1886. W. ALLEN & HOLMES, JJ., absent.

The indorser of a promissory note became insolvent and absconded from the Commonwealth before the maturity of the note, and his address was known only to his counsel, a confidential friend, and his immediate family. Before he absconded he left his address with his counsel, who had charge of his affairs, and it was understood between them that his counsel should send him anything relating to his affairs that he deemed important, and that everything sent to his former place of business should be turned over to his counsel. When the note became due, the indorser had no place of business in this Commonwealth; but his sign remained over the door of the store he occupied before he absconded, and his assignee under a voluntary assignment for the benefit of his creditors was there. The indorser had a domicile in a town of the Commonwealth other than that in which he did business, and this domicile he retained after absconding. The holder of the note knew of the insolvency and of the assignment, but did not know that the indorser had ceased to do business at his former place of business, or that he had a residence here, and, when the note matured, sent notice of its non-payment to the indorser's former place of business. The indorser did not receive the notice, in consequence of his counsel's telling the assignee not to send to him notices of protests. *Held*, that due diligence was used in giving the notice.

CONTRACT, against Fayette Shaw and Brackley Shaw, co-partners under the firm name of F. Shaw and Brothers, to recover the balance due upon four promissory notes indorsed by the defendants in the firm name. Fayette Shaw alone defended. Trial in the Superior Court, without a jury, before *Knowlton, J.*, who found for the plaintiff; and reported the case for the determination of this court. The facts appear in the opinion.

*J. C. Lane & F. A. Wyman*, for the defendant.

*L. D. Brandeis*, for the plaintiff.

FIELD, J. The report in this case raises the question of the sufficiency of the notice given to F. Shaw and Brothers, indorsers of certain promissory notes of which the makers had, on demand, refused payment. The report finds that Fayette Shaw and Brackley Shaw constituted the firm of F. Shaw and Brothers; that no service of the writ was made upon Brackley Shaw, who was out of the Commonwealth; that Fayette Shaw, who alone was served with process and alone defends the suit, "had left the country to avoid liability to arrest upon civil process" before the notes matured; and was, at the maturity of the notes, in

hiding in Canada, and only "Mr. Morse, one confidential friend, and Mr. Shaw's immediate family, knew of his address at that time." Before he left Boston for Canada, he "left his address with Mr. Morse, his counsel there [in Boston], who had charge of his business and his affairs, and it was understood between them that Mr. Morse should send him anything and everything relating to his affairs that he deemed important. It was also understood that everything that was addressed to him, or to F. Shaw and Brothers, at No. 268 Purchase Street, should be turned over to Mr. Morse."

"At the time the plaintiff's notes became due, the defendants had no place of business in Boston or elsewhere in this Commonwealth, but their sign remained over the door at No. 268 Purchase Street, and Wyman, their assignee, was there in the performance of his duties under the instruments of assignment." F. Shaw and Brothers had done business at No. 268 Purchase Street in Boston until they became insolvent, and assigned their property to Wyman by instruments, copies of which are annexed to the report. A notice of protest in proper form upon each of the plaintiff's notes was duly sent to 268 Purchase Street, addressed to F. Shaw and Brothers; but these notices were not sent from there to the defendant or his counsel, and the defendant had no knowledge of them, and no other notice was given him or Brackley Shaw of the dishonor of the notes. Soon after the defendant went to Canada, said Morse was informed by Wyman that notices of protest for F. Shaw and Brothers were pouring in there by the hundred, and he told Wyman, in substance, that he need not do anything with them, and said Morse never saw any of them, nor sent the defendant any communication regarding them, although he was in constant correspondence with him about his business affairs.

The following facts are also found: For several years prior to the indorsement of the notes, Fayette Shaw had his domicile in Newton in this State, and it has remained there ever since. The plaintiff knew of the defendant's insolvency, and of the assignments to Wyman, before the notes became due, but it had no knowledge that the defendant ceased to have a place of business at No. 268 Purchase Street, unless such knowledge is to be inferred from knowledge of the assignments. "The plaintiff

had no notice or knowledge of any other address of the defendant or of Brackley Shaw; and there was no evidence that the plaintiff knew, before commencing this suit, that Fayette Shaw or Brackley Shaw had or ever had a residence in this Commonwealth; nor was there any evidence that the plaintiff had made any effort to find out the residence of either Fayette Shaw or Brackley Shaw."

The first assignment was by Fayette Shaw of Newton, Massachusetts, and Brackley Shaw of Montreal, Canada, doing business under the style of F. Shaw and Brothers, to Ferdinand A. Wyman, of the property of the firm, in trust, first, if said Shaws or either of them be adjudged insolvent debtors, to convey to the assignee in insolvency such of the property as the assignee would be entitled to if the assignment had not been made; secondly, to reduce the property to money by selling it with the right in Wyman "to carry on the business of said firm for the completing of the manufacture of stock now on hand, and otherwise as far as shall be necessary and proper for the faithful and economical administration of the trusts herein and hereby declared and imposed on him, or shall be requested by the beneficiaries;" thirdly, to pay the proceeds, after deducting the expenses, equitably and ratably to the creditors; fourthly, to pay the balance to Fayette Shaw and Brackley Shaw, or to the survivor; and it was provided that Wyman "shall have power in and concerning the premises to use the name of them, or either of them, and of said copartnership, and as their attorney irrevocable to do all things in and touching the same which they or either of them might lawfully do if personally present, had these presents not been executed." The assignment is upon the condition, that, if they or either of them "shall hereafter make any arrangements with their creditors, whereby said creditors or a large majority of them consent that said property or any portion of the same shall be reconveyed to" them or either of them, Wyman shall convey the same "to the parties entitled thereto under said settlement or arrangement with creditors." The second assignment was subsequent to the first, between the same parties and of the same property, and it provides for a sale of the property, the payment of the proceeds, after deducting the expenses, ratably to creditors, and the payment of the balance remaining

to the Shaws, or the survivor of them, with a power to do all things in and touching the premises which the Shaws might do if personally present.

This case has been argued by the defendant as if the Shaws had gone out of business, and one of them had retained his residence in Newton ; but it is plain that they were still interested in the management of the trust, and that what remained of their business was still carried on at No. 268 Purchase Street, Boston, even if "they had no place of business there, or elsewhere, in this Commonwealth," and that the defendant was an absconding debtor in concealment without the Commonwealth. It is important that the law of negotiable paper be definite and certain, and, when notice has not been actually received in due time by an indorser, the question is whether due diligence in giving notice has been shown, and this, when the facts are all found, is a question of law. Notice may be given at the place of residence or the place of business, and, when the place of residence is not the place of domicil, notice at the place of residence is sufficient, although it has not been decided that notice at the place of domicil is not also good. The facts may indeed be such as to make it difficult to determine what is the place of residence or the place of business, or whether there is any place of business distinct from the place of residence, and courts must deal with such cases as best they can. The guiding principle is, that notice should be sent to the place where the party to be notified will be most likely to receive it, and reasonable diligence must be shown in ascertaining where that place is. When the indorser is a partnership, notice to one partner is notice to all ; but, as the partners may reside at different places, and sometimes far distant from the place where the business is carried on, a notice at the place of business, if there is such a place, is plainly the better, because there the partnership can best consult and act so as to protect itself from loss. In *Chouteau v. Webster*, 6 Met. 1, "the defendant's general domicil and place of business was in the city of Boston, where he had, at all times, an agent, who had the charge and management of his affairs," but he "was actually resident in Washington, in discharge of his public duties as a Senator ;" and the court held "that notice to the defendant, by mail, addressed to him at Washington, was good and sufficient notice



of the dishonor of these notes." It did not appear as a fact, that the notice had been actually received by the defendant. The court distinguished between domicil and residence, and based the decision upon the circumstances of the case and the general rule "that notice shall be so given, and at such place, that it will be most likely to reach the indorser promptly." See *Young v. Durgin*, 15 Gray, 264.

It is also plain that Morse, who had charge of the defendant's business and affairs, did not mean that the defendant should actually receive the notices of protest, although he was informed where they were sent. On the facts found by the court, if the plaintiff had known them all, it must have been considered more likely that the defendant would receive the notices if sent to 268 Purchase Street, Boston, than if sent to Newton. It does not appear that the defendant had any agent at Newton, or anything there but a naked domicil, while he was concealed in Canada; even if his family were there, which does not distinctly appear, it is not found that they had any authority over his business or the business of the firm. In *Bliss v. Nichols*, 12 Allen, 443, the court say: "But the broader and more precise ground on which the sufficiency of the evidence of notice in this case rests is this, that the bill being drawn in the partnership name, notice to the partnership, while it continued, was notice to all the members; that the holder, having had no notice of the dissolution of the partnership, had a right to treat it as subsisting; and that the notice sent by mail, addressed to the partnership at its place of business, and where the draft was drawn, was there duly received by the agent employed to settle the partnership affairs."

The execution of the assignments in the present case did not necessarily dissolve the partnership. The notes were all expressly made payable in Boston. It may be said that Wyman was not the agent of the firm to receive notices of protest of notes, so as to bind the members of the firm personally, but the notices were not addressed to Wyman, but to the firm at its former place of business, where its affairs were being settled in accordance with the assignments, and there was, so far as appears, no other place of business of the firm or of the defendant, and his actual residence was without the Commonwealth and unknown.

We are not required to decide whether notice, addressed to the defendant or to the firm at Newton, would, under the circumstances, have been a good notice, or whether, in all cases, the holder of a note may assume that the place of business of an indorser continues the same from the time of indorsement to the maturity of the note, unless he knows or has reason to know that it has been changed. On the facts of this case, we think it was the duty of the court below to rule that the notice was good, because it was sent to what had been the place of business of the firm, where its affairs were actually in process of settlement under the trust; it was the place where the defendant expected that notices and letters would be sent to him; he had arranged that, if sent there, they should be handed to Mr. Morse, who alone had charge of his business and affairs, to be forwarded to him in Canada if Mr. Morse deemed them important; and there was no other place of business of the firm or of the defendant, and he had absconded.

Although perhaps it may be assumed that the defendant's family remained in Newton, and although the court has found that the defendant's domicil was there, which must mean that he intended to return there when he thought he would be safe from arrest, yet, under the decision in *Grafton Bank v. Cox*, 13 Gray, 503, we think, on the facts, that a demand at 268 Purchase Street would have been good, if the defendant had been the maker of the note, and the law governing a demand upon the maker is somewhat more strict than that governing notice to an indorser. See *Pierce v. Cate*, 12 Cush. 190.

*Judgment on the finding.*

MINNIE L. WRIGHT vs. BOSTON AND ALBANY RAILROAD  
COMPANY.

Middlesex. March 12. — July 3, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

In an action against a railroad corporation for an injury sustained by the plaintiff while crossing the tracks of the defendant railroad, there was evidence that the plaintiff approached the tracks from the northward by a path which did not connect with a public street, but which for some distance northward of the tracks had been used by the public for twenty-five years, and at a more remote point, in the same direction, for fifteen or sixteen years; that the path was from three to five feet in width, and well defined; that on each side of the path, near the railroad, there was a ridge two or three feet in height, caused by dirt being thrown up in cleaning ditches on the side of the railroad, with a clear passageway left for the path through the ridge; that there was no fence or other obstruction to passing across the railroad from the path, and no objection had been made by the servants of the defendant to persons crossing there, except when cars were approaching; that, when freight cars were left standing on the tracks, openings were sometimes left between them opposite the path; that at some distance to the westward of the place where the path crossed the tracks was a covered culvert, and between the path and the culvert was a well-worn and smooth space between two lines of tracks; that to the westward of the culvert there was planking between the rails, and a path on the south side of the tracks near the platform of a station of the railroad; and that some persons using the path when coming from the northward, on reaching the tracks, went by this space between the two tracks to the path on the south side, and others went in different directions. *Held*, that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to use the path to cross the tracks; and that, in the absence of evidence that the injury to the plaintiff was occasioned by the wilful or reckless misconduct of the defendant or its agents, the action could not be maintained.

TORT for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. Trial in the Superior Court, before *Brigham*, C. J., who reported the case for the determination of this court, in substance as follows:

There was evidence on the part of the plaintiff tending to prove the following facts:

On October 13, 1882, the plaintiff, being then between six and seven years of age, while going to school and crossing the track of the defendant's railroad in Natick, received the injuries complained of. At the time of the injury, the plaintiff had entered upon said track from a path, by which she had come from her father's house on the north side of the track, and was

intending to cross the northerly part of the track, a switch track, then to walk to the westward between the switch track and the north main track, and then to cross over a covered culvert, then over the main track where the same was planked between the rails, to a path on the south side, by the end of the depot platform, and leading diagonally over open ground to Washington Street, and thence to a school-house. The plaintiff had been accustomed, in summer and in winter, to go from her father's house to school as she was going at the time of her said injury, and over the same places in a reverse direction in going from school to her father's house. At the time of said injury, a little before nine o'clock in the forenoon, the plaintiff and her sister, who was then between twelve and thirteen years of age, were walking hand in hand on said path, and had entered upon the north side of said track, when they were struck by the defendant's freight cars moving on said track.

The path from said track northerly, for about half the distance to North Street, had existed and been used for twenty-five years, and the rest of said path had existed and been used from fifteen to sixteen years. The path had been used and travelled by persons in going to and from a factory and residences on the north side of the track, and by children in going to and from school over and across the track, on ordinary occasions to the number of as many as one hundred persons per day, and in much larger numbers when there were games or circuses on the vacant lot of land on the north side of the track. Of the persons thus using the path, and crossing to and from the same over the track, some of them passed towards the west, walking between the rails of the track and crossing to the south side of the track, and others of them, after leaving the path, or in entering upon it, in going or coming across the track, going in different directions, according to their convenience. The path was from three to five feet in width, well beaten, hard, worn, and smooth, declining about two feet in six as it approached the track. On both sides of the path there was a ridge from two to three feet in height, caused by dirt thrown up in clearing ditches on the side of the track. On one side of the path there was a cobble wall or stones, upon which dirt had been thrown up to the height of two feet; and

there was a clear passage by the path through the ridge to the track. There was no fence or obstruction to passing across and over the track to and from the path. No objection was made by the officers or servants of the defendant to the crossing of the track to and from the path, and no public notices were put up, forbidding the same. Between the rails on the track, from the switch nearest to the path on the east, to the culvert on the west of the path, there was a well-worn and smooth space, trodden down by persons walking to and from the path, over and across the track; and there was an arm of Pegan Brook passing under the covered culvert, and under the defendant's entire road-bed, to a freight-house yard on the north side of the track. Of said culvert, which is opposite a hand-car house on the south side of the track, a portion only is covered, and there was planking between the rails of the track. The defendant's servants, in cleaning out the ditch on the north side of the track, did not put earth on the path at its entrance upon the track; but there was no evidence of any instructions so to do from the defendant's officers, unless such instructions may be inferred from the acts of said servants as the same were from time to time performed. At night, freight cars of the defendant were left standing on the track, sometimes with openings between them opposite the entrance to the path from the track, and sometimes without such openings. The path was not used by the defendant's servants or agents, or kept open for the defendant's convenience; and said culvert was not used by the defendant in its business, excepting by its servants to stand upon or to walk over. The switching of cars at the freight-yard was done near the freight-house; and, for more than a year prior to the plaintiff's injury, one Nickerson, employed by the defendant to direct the switching of cars on the track, while thus acting near the path, on various occasions warned and prevented persons, who were about to walk to and from the path across the track, from so doing, until cars had passed the path, and, after such cars had passed, such persons crossed the track to and from the path, without being prevented or forbidden so to cross by Nickerson, or by any other of the defendant's servants.

On the morning of the plaintiff's injury, Nickerson was not at said place; and on said morning three freight cars had been

cut off at a crossing, by a flying switch, from a freight train of the defendant going west, the rest of which continued on the main track and passed the station before the three cars thus cut off had reached the flying switch. The three cars were switched upon a side track, and were moving thereon westward at the rate of from eight to ten miles per hour, the grade in that direction from said crossing being downward, with two brakemen thereon, one of whom was at the brake, (there being one brake only on each of said three cars,) at the rear end of the foremost of the cars, with his back toward the west, and did not see the plaintiff, or her sister who was with her. The other brakeman was at the hind end of the rear car, and was not able to see what occurred in front of him. The freight train was from fifteen to thirty minutes behind its regular time in arriving at Natick on said morning. While the three cars were moving along towards the entrance from the track upon the path, the plaintiff and her sister came along the path to the track, looked around, but neither saw nor heard the approach of said three cars, or of any cars excepting an express train on the southerly main track, which passed the station while they stood in the path; and, after the passing of said express train, the plaintiff and her sister went from the path upon the track, to cross the same and go to the west, between the rails of the switch track and the north main track, when they were struck by the foremost of said three cars before they reached the space between the rails. There was no evidence that the view of the track from the path to the eastward was obstructed.

The judge ruled that, upon the plaintiff's evidence, the action could not be maintained; and directed a verdict for the defendant.

*B. Wadleigh & C. Q. Tirrell*, for the plaintiff.

*A. L. Soule*, for the defendant.

- FIELD, J. We assume, in favor of the plaintiff, that a private or public right of way across a railroad may be acquired by prescription, since the passage of the Pub. Sts. c. 112, § 195, and the acts of the Legislature of which this section is a reenactment. St. 1874, c. 872, § 148. Gen. Sts. c. 63, § 102. St. 1853, c. 414, § 4. See *Gay v. Boston & Albany Railroad*, 141 Mass. 407.

We assume, too, that if the plaintiff was invited to cross the track where she crossed it, she cannot be said to have been upon the track without right, within the meaning of the St. of 1874, c. 372, § 148; and that there was evidence for the jury that the plaintiff was in the exercise of due care.

It is doubtful from the report whether the path had ever been used all the way to North Street, or North Avenue, from the railroad track; but if it had been, the northerly portion had been used only for fifteen or sixteen years. There was no evidence of any defined pathway extending from one public road or place to another, which had been used by the public generally for twenty years. The plaintiff was going from her father's house on the north side of the track to a school-house on the south side, as she had been accustomed to do; but there is no evidence of a private right of way over the railroad, appurtenant to the estate occupied by the plaintiff's father; or that the owners and occupants of that estate had used the particular way over which the plaintiff was going, continuously, adversely, and as of right, for twenty years. If any other persons residing on the north side of the railroad had acquired a private right of way over the railroad, that cannot avail the plaintiff. The evidence was insufficient to warrant the jury in finding that there was either a public way or a private way which the plaintiff had a right to use.

The plaintiff contends that the evidence showed that the defendant held out to the public an inducement and invitation to use this path by the peculiar construction and adaptation of the premises, as well as by the acts or declarations of its agents. There was no express invitation by the defendant or its agents. The plaintiff was not using the way for the purpose of transacting any business with the defendant or its agents, or of coming upon the property of the defendant for the purpose of doing anything except to cross its road-bed to go to school. The way across the switch-track was not planked or prepared for use in any manner, except that a clear passage had been left through the ridge formed by throwing up dirt from the ditches on the side of the track. A mere permission or license from the defendant to cross the track is not an invitation. Whether the construction of a crossing over a railroad is such as of itself to

amount to an invitation, or evidence for the jury of an invitation, by the railroad company to the public to use the crossing for the convenience of the public, must be determined by considering whether the construction was such as reasonably to induce the public to believe that the crossing was a public way. *Murphy v. Boston & Albany Railroad*, 133 Mass. 121.

The want of a planking over the switch-track, the absence of public ways or public places on each side of the track with which the crossing was immediately connected; the different directions taken by persons using the path, and the irregular course of the path used by the plaintiff after it crossed the switch-track from the north, all tend to show that it was not prepared by the defendant corporation with the intention that it should be used as a public way.

As the plaintiff was on the track without right, and as there was no evidence of wilful or reckless misconduct on the part of the defendant or its agents, the court properly ruled that the action could not be maintained. *Johnson v. Boston & Maine Railroad*, 125 Mass. 75. *Wright v. Boston & Maine Railroad*, 129 Mass. 440. *Morrissey v. Eastern Railroad*, 126 Mass. 377.

*Judgment on the verdict.*

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DANIEL EDWARD COLLINS vs. SOUTH BOSTON RAILROAD  
COMPANY.

Suffolk. March 12. — July 8, 1886. W. ALLEN & HOLMES, JJ., absent.

The parents of a boy about four years old permitted him to walk in the streets of a city in the daytime under the care of his sister, who was nearly eleven years old. In an action against a street railway corporation for an injury sustained by the boy while so walking, there was evidence that the girl was accustomed to take her brother to walk, and that she was a girl of ordinary intelligence, and bright about doing errands. *Held*, that it could not be ruled, as matter of law, that the parents of the boy were negligent in permitting him to go upon the streets with his sister, or that she had not sufficient intelligence and discretion to be entrusted with his care.

In an action against a street railway corporation for injuries occasioned to the plaintiff, while on a street crossing, by being struck by a car of the defendant, there was evidence that the driver of the car, as it approached the crossing, was looking back at a car which had passed. *Held*, that there was evidence of negligence on the part of the driver.



In an action against a street railway corporation for an injury occasioned, in the daytime, to a boy about four years old, the plaintiff's evidence tended to show that he was in the care of his sister, who was about eleven years old and of ordinary intelligence; that after starting to cross a street on the cross walk, the sister, who had hold of her brother's left hand, saw a car approaching, and kept on until they were near the track on which the car was approaching, and nearly abreast of the horses; that then she, becoming frightened, pulled away from her brother, or he from her, and left him, going either in front of the horses or in the rear of the car, and he, after being left, ran in front of the horses, and was knocked down either by the feet of the horse which was the farther from him when he started to run, or by the side of the dasher of the car, and was drawn under the car and injured. The rate of speed of the car, its distance when the sister first saw it, and the persons and objects in the street which might have influenced her conduct, were differently described by different witnesses. *Held*, that it could not be ruled, as matter of law, that the sister was not exercising the care over her brother which might reasonably be expected of a child of her age.

TORT for personal injuries. Trial in the Superior Court, before *Gardner, J.*, who reported the case for the determination of this court, in substance as follows:

The plaintiff, a boy four years and twenty-three days old, lived with his parents in Athens Street, South Boston, near the corner of C Street, Athens Street being the next street northerly of and parallel to Broadway. He left home on the afternoon of July 29, 1882, in company with his sister Nellie, a girl eleven years of age less a month and five days, to buy candy at a shop on C Street, but on the other side of Broadway from where the plaintiff lived; and while on their way home, and crossing Broadway, the plaintiff was knocked or fell down, and was run over, in Broadway, by one of the defendant's cars, driven and controlled by its agents, coming from City Point and on its way to Boston, causing the injuries complained of.

Broadway runs about east and west, and C Street about north and south. On the southwesterly corner of Broadway and C Street is a cigar shop; on the northwesterly corner is a drug store, kept by one Gleason; on the southeasterly corner is a grocery; and on the northeasterly corner is a shoe shop, kept by one O'Hara. A cross walk, six feet wide, substantially in the line of the sidewalk on that side of C Street, runs across Broadway from the corner on which is the cigar shop to the corner on which is the drug store. The other corners are also connected, respectively, with cross walks.

The defendant is a corporation operating lines of street railway from Boston proper to City Point in South Boston, one of which runs through Broadway, a public street, where there are two tracks. The cars going from Boston run upon the southerly track, which is called the outward track ; those coming to Boston run upon the northerly track, which is called the inward track ; so that cars meeting pass each other to the right. At and approaching the point of intersection of Broadway and C Street, both streets are substantially level and straight for a long distance. Another line of the defendant's cars running to City Point, known as the Dover Street line, runs through Fourth Street (the next street south of and parallel to Broadway) to said C Street, thence northerly through C Street to Broadway, turning into the outward track in Broadway, and thence to City Point.

The report, after stating that the foregoing facts were not in dispute, and that the evidence in regard to the circumstances attending the accident was conflicting, set forth the testimony of the witnesses in full.

The following is a synopsis of the evidence in behalf of the plaintiff, so far as it is material to the points decided.

Patrick Collins testified that the plaintiff was his son ; that, on the evening of the accident, he started out with his sister Nellie to get some candy ; that Nellie assisted his wife in the care of the children ; that his wife took in sewing, and Nellie, for the most part, brought the sewing and carried it back.

Ellen Collins, the wife of Patrick, testified that she had no one but Nellie to help about the house and children ; that Nellie took the children to walk, and had taken them beyond the corner of Broadway and C Street ; and that Nellie was kind and attentive to the children.

James McDermott testified that he was by Gleason's drug store, when he heard a shout ; that he looked and saw the plaintiff, about five feet from the horses' heads, on the left-hand rail ; that the next thing he noticed was the boy's being thrown down ; that he should say it was the off forward foot of the off horse that threw him down ; that he then looked at the driver, and found that he was leaning in a listless attitude, putting on the brakes ; that he should think at the time that the driver was either

looking down the street or sidewise; that he supposed the boy went under the forward wheel and under as far as the hind wheel, and was dragged a considerable distance, say about twenty feet; that he should say the boy was on the cross walk; that the driver was leaning so that his right leg was toward the dashboard, and his back toward the witness; that the driver, after the boy was knocked down, put on the brakes; that the horses were within the rails; that, when the brakes were applied, the car was going about three miles and a half an hour; that, when he started for the car, he saw a young girl about opposite the middle of the car.

On cross-examination, this witness testified as follows: "The first shout came from the sidewalk, and the next shout, I think, from the driver. The first shout attracted me; saw the boy before I heard the second shout. Just as I heard the shout I threw up my eyes towards the horse car, and then saw the little boy. He was upon the nigh rail, that is, the farthest rail of the nearest track to me. I saw him run across in front of the nigh horse, and get struck by the off horse. I did n't see anybody with the boy at that time. I did n't see anybody run across in front of the boy, and I did n't see anybody run across the track behind him. The driver's back was toward me; I did n't see his face. I saw the boy ahead of him on the farther rail from me, running right across."

Frank McCue testified as follows: "When the accident occurred, I was on the south sidewalk of Broadway, about five feet from the corner of C Street, near the cigar store, intending to cross Broadway to Gleason's corner. I saw a little boy and girl. When I first saw them, they were crossing in front of me, and passed right along over upon the crossing, and the girl had hold of the boy's hand. They were going across Broadway from the cigar store toward Gleason's drug store. When I first saw them, they were just stepping off the curbstone to get on to the crossing. I looked after them for a little while to see where they went to. The little boy had hold of the girl's hand, and he went as far as the horse car, and the little girl let go of the boy's hand. I saw the horse car coming down there, and it was going at the usual rate, that is, at a trot. I could not tell how fast they were going, how many miles an hour. This little boy

happened to run right around, and he was struck. I could n't tell whether it was the car or the horses struck him; I am not sure. The horse car, when I first saw the children, was almost up to the second crossing, the one in front of O'Hara's, coming from City Point. The two children continued to walk, till I suppose the little girl got frightened. She was afraid the pole might strike her, or something, and she let go of her brother, and ran off. The pole was almost right up side of her, when she let go of her brother. They were on the crossing when she let go. They had kept right straight on the crossing from the time they had stepped from the curbstone until she let go of the boy. I did not hear any shout. The horses were between the tracks, in the regular place for them, going at a slow trot. The girl had hold of the boy's left hand. The boy was next to the horses. I saw him fall, and saw him under the wheels, and helped lift the car off. At the time I saw him fall, the horses were still trotting. The boy was in under the car, and I don't know,—I suppose some one hollaed to the driver, I could not tell who it was, that there was a child in under the car. When the child was in under the wheels, I took no notice of the driver; I saw him put on the brake. When the driver first began to put on the brake, the child was seven to eight feet from the crossing in under the wheels. When the little girl let go of the child, I could not tell what she did, or where she went. I noticed her coming along with her brother, and I noticed the two in separating from one another; the girl ran around upon the crossing; I never saw where she went to. The pole was almost up to her, almost side of her. When she let go of the child, I could not tell whether she was between the rails on which the car was coming, or in front of the horses. She was going across on the crossing when she let go. I should think the pole was not more than two feet from her. I saw how the driver was standing with respect to the horse car as the car came down Broadway just prior to the accident. The best way I could explain it is that he was standing kind of sideways. The driver was standing in the usual place with his right side against the car dasher, and his face turned to the left, looking down C Street, towards Fourth Street. He was standing kind of sideways. I don't know when he changed his attitude; I don't

believe he changed it until he found out there was a young one under the wheels. He applied his brake as soon as he found out that there was a child in under the wheels."

On cross-examination, he testified: "The little boy did not pull away from the sister; it was the sister pulled away from the boy. At the time the girl pulled away from the little boy, they were on the crossing, on the outward track that leads down to City Point, between the outward rails, and the car was coming on the inward track. When the little girl pulled away from the little boy, she ran away and left him. The little boy tried to get out of the way as well as he could. The pole of the car was pretty near up side of the boy when the girl pulled away. He ran right around after his sister pulled away from him; right around in front of the horses. I don't know whether the horses or the car hit him, but he was hit, or he went under the axle of the car, on the farthest side from me. He ran right around the horses' heads. He curved out around, didn't run straight. The car was coming so close upon him, he tried to go in front of the horses, and in doing that he had to curve around to his left."

On re-direct examination, the witness testified: "The child remained on the cross walk until the car came up to him, and then ran around the pole to try to escape from it. In running around the pole, I should think he left the cross walk; he must have left the cross walk, because the pole was almost upon the cross walk.

William J. Lowry testified as follows: "I am a police officer of the city of Boston. I remember the accident to the Collins boy at C Street. It occurred about twenty-five minutes past seven o'clock; it was daylight, the sun had not set. I was on the southerly side of Broadway on the sidewalk, perhaps one hundred and twenty or one hundred and thirty feet from the cigar store in the direction of Boston, walking toward Boston. My attention was attracted by some person hollaing quite loud, apparently from across the street and back of me, on Gleason's side of Broadway. I turned around and looked in that direction. I saw an open car come to a stop suddenly, and I saw people rushing toward the off side from me. The car was in the act of stopping; the driver seemed to be putting on his brake hard. I did

not see the child that got run over at that time when I looked around, nor the Collins girl. There was quite a rush all over the street towards the car, so I could not specify any particular person. I did n't see any little girl in the vicinity of the horses. I measured the distance from the point of the car pole to the crossing; it was forty-seven feet; found the car and pole to be by measurement thirty-five feet long, and made calculation that the rear end of the car was about twelve feet over the crossing. I measured to the side of the crossing nearest to the car. When I first saw the child, it was directly between the wheels, or the axles of the car, underneath, in the middle of the track; I should think about twenty-four feet from the crossing. The car was apparently coming to a standstill when I looked around. I could not judge how much farther it went; being in a direct line with it, I could not judge exactly, but it apparently was stopping. I noticed the driver braking up his car hard at the time I looked around. I think the child was run over before I looked around."

William P. Carroll testified as follows: "I remember when the accident happened to the Collins boy. I was on the north-erly or right-hand side of Broadway, coming to the city, — the same side that Gleason's apothecary store is on; about seventy-five feet towards Boston from Gleason's store, going towards C Street. I think it was children in the street playing after the band car that attracted my attention. I know that I looked up, and when I looked up, I saw a girl and a boy crossing from the tobacco store to the apothecary store. I saw a car coming; I saw there was going to be an accident; I didn't see any way that the accident was going to be avoided. I saw the driver, holding his reins, and looking as if he was looking back the way he had come; he might have been looking down a street, but it looked to me then, taking it all in an instant, that he was looking to his left, up Broadway. I immediately jumped and yelled and ran. The accident, the running over of the boy, the turning on of the brake, and all, was in an instant, as I saw it, — all in a second. When I saw this boy and girl in danger of being run over, it seemed certain they were on the cross walk. When I first saw them, that horse car may have got across the crossing at O'Hara's, and it may not; all this I saw so quick, and every-

thing at once, that I don't want to say the car was on the O'Hara crossing. I think myself the car might have got across the crossing, and was between the two crossings. What I saw was an accident going to occur, and that position of the car, and the position of the children, forced that conclusion on me; there had to be an accident, and I saw no way to avoid it. After I shouted, I heard nothing; only to get to the car. The horses of the car were in the usual place in the centre of the track; they were between the two rails, going in an ordinary trot. I saw the little child when he fell down, and saw him struck by the horses, and the girl just getting away from him. I thought the two children would get under the car; that is the way it looked to me. The little boy was struck by the horse; the other child just escaped. The child falling, the putting on of the brake, and all, was as quick as it could be. The child might have fallen a little bit before, but I don't want to swear to it. As I have testified before, I believe it all occurred right in an instant, and it is impossible for me to decide which occurred first. When I looked up, I am positive the driver was as I have described, and after the time of the accident I talked to him about it. His position was as I have described it, looking up to what had passed by,—a band car. There was certainly a band car in that vicinity; it came up C Street, and went up Broadway toward City Point. There were a number of children in the street; boys and girls together."

On cross-examination, the witness testified: "I saw the boy get struck by the horse nearest me,—the right-hand horse as the driver was driving. The little girl had just escaped it. She was toward Gleason's. She ran across right in front of him, as it appeared to me. She had just got off the rail running towards Gleason's as the little boy was struck. Both were together when I first saw them. At the time the off horse struck this boy, they were just together, and the boy got struck and the girl just escaped it. I saw them separate. I saw them, as I thought, having hold of hands then; I did n't see them when they took hold of hands. I believe the girl was on the left-hand side of the boy. I saw them with their hands together, and when the boy was struck, I saw the separation right there at the instant the boy was struck. I cannot really state positively which was

nearest the horses. I think they separated just as the boy was struck, a little prior; probably it might be a little before the boy was struck. When they separated, they were four feet, or whatever the distance might be, a small distance from the horses' heads."

Nellie Collins testified as to the buying of the candy, and then starting for home; and that when she started to cross Broadway toward Gleason's she had hold of her brother's hand. Her testimony proceeded as follows: "When I first stepped down on the cross walk, I turned around and saw the band car. I continued walking along on the cross walk. I saw the band car before I saw the one coming from City Point. I saw the latter when it got to O'Hara's crossing. The horses were on O'Hara's crossing. This was after I had looked back at the band. We were near the rail the cars come up on from Boston when I saw the horses at O'Hara's crossing, and walked along. I had hold of Eddie's hand. Next noticed the horses between the two cross walks. As we walked over the cross walk, Eddie was next to the horses."

She further testified that she heard some one holla, and left Eddie and ran across, because she thought she was going to be knocked down herself. "The horses' heads, when I let go of him, were pretty close to us; we were then between the four rails. I do not know who it was I heard shout, or the direction it came from. I let go of Eddie just as soon as I heard it. I was not playing with Eddie, or fooling, or playing with the other children, running around, or doing anything of that kind. I was on the cross walk when I let go of Eddie. I cannot tell whether Eddie was knocked down by the horses or the car."

On cross-examination, she testified: "Eddie pulled away from me across in front of the horses, before I ran. We were stopping between the outward and the inward tracks. I thought I could get across before the car came. I heard some one holla, and that scared me. I let go of Eddie and left him there."

In answer to a question whether she ran around in front of the horses, the witness answered, "Yes." Later on, in her cross-examination, she said she did not know whether she ran in front of the horses or in the rear of the car.



Mrs. Rhodam B. Eckett testified as follows: "I started to cross Broadway on the crossing from Gleason's to the cigar store, and at the same time I saw two children enter the cross walk from the opposite side of Broadway at the cigar store,—a boy and a girl; and I turned around to see if the road was clear; I had already stepped off the sidewalk, I believe; and I stepped back to look up Broadway towards the Point. As I stood looking, my attention was arrested by a shout; the car was coming then; I noticed the car, but I had full time to cross, only that I thought I saw my husband there. The shout attracted my attention, and as I turned, I saw these two children still on the cross walk and the car quite close to them; and the little boy seemed to drag back, and the little girl started ahead, and the little boy made a short hesitation, and then started too. I stood and held my breath. I certainly thought the child would clear the horses, as he did. He cleared the horses, and I could not say if it was the hind foot of the horse or the end of the car that struck the child. The child cleared the horses' heads. Then I saw no more. I first saw the car when I first turned up to look if the place was clear. It was a little distance above the upper cross walk, O'Hara's cross walk. The horses were not more than the length of the horses above O'Hara's crossing when I looked up. The horses, in my estimation, were trotting as fast as they always do on Broadway. The two children, when I first saw them, were entering on the cross walk, on the cigar-store side. I noticed the children before I noticed the horse car. The children when I first saw them were on the cross walk. When I next saw them they were on the cross walk, I should judge, almost between the two car tracks at the time I heard the shout. I think they were just about entering the track that the car was on, when the little girl let go of Eddie. As near as I can estimate, when the shout was, they were between the two tracks; and when she let go, they were on the cross walk about at the first rail the car was coming down on. The horses were inside the rails as usual. The driver did not commence to put on the brake till after I heard the shout; he commenced before Eddie was down. When the driver commenced to put on his brakes, I should judge the child was just passing in front of the horses. The girl ran forward and cleared the horses, and I thought the

little boy would too. She ran towards Gleason's corner. She did not run back to the other side of the car."

On cross-examination, this witness testified: "When I looked up, the car was up at O'Hara's, about the length of the horses, I should say, from the cross walk. Then I saw these little children coming across. I had plenty of time to cross. The car was coming at what, I suppose, you call a trot. My attention was for a moment diverted from the children, by looking for my husband; then I heard a shout, and I looked up, and I saw the little boy seem to pull back from the little girl. When that happened, I should think he was just entering on to the last car track. They had crossed the first car track, I am sure, and I should judge they were just entering the second one, the one nearest me, the one the car was on; the shout was what made me look up. I saw that scene in front of the horses, the little boy dragging back. I should judge they were about three feet from the horses' fore feet; I don't know how far from their heads. The little boy seemed to hesitate for a minute; the little girl had n't let go of him then; the hesitation seemed only momentary; when she let go and ran, he followed. Then they had n't hold of hands. The little girl did not run in a curve, and go around the horses' heads; I could not say about the boy; she cleared the horses, and I think the boy too; he may have swerved a little, but the little girl did not run off the cross walk. I am sure it was not the front feet hit him, nor the pole. He had got across the two horses. It was either the hind feet of the horse or the step at the side; it was an open car. He had cleared the front feet of the horses when he was struck."

Jennie Mullaly testified that she had been a school teacher for seven years in the public schools of Boston; that Nellie Collins came in September, 1882, and left in June, 1883; that she was a child of ordinary intelligence, and was promoted from her room with the other children in whose class she was; that she was sent for absent girls quite often, and was very bright about errands, and very quick.

In view of the opinion of the court, it seems unnecessary to state the evidence in behalf of the defendant in detail. It tended to show that the children were not crossing the street on the cross-walk; and the driver and the conductor of the car testified

that, after the plaintiff passed the horses, he went several feet towards the sidewalk, and then turned back and was struck by the forward end of the car.

At the close of the evidence, the defendant asked the judge to rule that, on all the evidence, the plaintiff was not entitled to recover, on the ground that he had not shown that he was in the exercise of due care, or that his custodian exercised such care, or that the defendant was negligent. The judge declined so to rule, and submitted the case to the jury, under instructions not excepted to. The jury returned a verdict for the plaintiff in the sum of \$13,000.

If, upon the evidence, the case was properly submitted to the jury, the verdict was to stand; otherwise, to be set aside.

*R. D. Smith & P. West*, for the defendant.

*H. E. Bolles*, (*G. A. Sawyer* with him,) for the plaintiff.

FIELD, J. We cannot say, as matter of law, that the parents of the plaintiff were negligent in permitting him to go upon the streets with his sister, who was then nearly eleven years old, or that the sister had not sufficient intelligence and discretion to be entrusted with the care of him. *Mulligan v. Curtis*, 100 Mass. 512. *Lynch v. Smith*, 104 Mass. 52. *O'Connor v. Boston & Lowell Railroad*, 135 Mass. 352. Neither can we say that there was not evidence for the jury of negligence on the part of the driver of the car. There was evidence that he was looking back. *Commonwealth v. Metropolitan Railroad*, 107 Mass. 236. The driver of a horse car in a street where there are children may well be required to manage his car with reference to all the risks that may reasonably be expected, and among these may be reckoned the risks arising from the heedlessness and indiscretion of children in the street.

All the evidence in favor of the defendant may be disregarded in considering the questions of law before us, and the evidence of Nellie Collins is not necessarily to be taken as true against the plaintiff, if there is other evidence in his favor which contradicts it.

It must be taken, on any view of the case, that the plaintiff ran across the track in front of the horses, and was hit either by the off fore leg or off hind leg of the off horse, or by the right-hand side of the dasher of the car or of the body of the

car, and thus thrown down and under the car, or that he fell upon or near the right-hand rail and was drawn under the car. His sister left him just before they reached the track on which the car was coming, and when the horses were dangerously near to them; and either ran across in front of the horses, or ran back, leaving him to run across alone, while she afterwards followed him, going either in front of or behind the car. It was said in *Lynch v. Smith*: "It does not necessarily follow, because a parent negligently suffers a child of tender age to cross a street, that therefore the child cannot recover. If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act that prudence would dictate, there has been no negligence which was directly contributory to the injury." 104 Mass. 57. But if the child does act in a manner which would be careless in a prudent person of mature years and ordinary intelligence, and this carelessness contributes to the injury, what is the test by which the conduct of the child is to be tried in determining whether it has exercised due care?

Courts have held that, up to a certain age, not very accurately defined, it must be conclusively presumed that a child has not sufficient intelligence and discretion to exercise due care under the circumstances and in the place in which he is found, and that it is negligence on the part of the persons who have charge of him to permit him to go there unattended. If such a child has not acted as reasonable care would dictate, judged by the ordinary standards for adult persons, and this has contributed to the injury, and if the persons having the charge of such a child have negligently permitted him to go there alone, both these facts constitute negligence which will prevent him from maintaining an action. There is also an age within which courts have held that one child is conclusively presumed not to have sufficient intelligence and discretion to take charge of another who is younger, and that it is negligence on the part of the parents or guardians of such children to permit them to go together to places of danger, and if they do, and the children do not use reasonable care, and this has contributed to the injury, they cannot recover. Beyond these ages, courts have left it to the jury to determine whether the parents or guardians were negligent in

permitting a child to go alone to a place of danger, or in permitting him to go there in charge of another child, and if it is found that they were not negligent, then it has been left to the jury to determine whether the child or children reasonably exercised that degree of care of which they were capable, and it has been said that it is only necessary for them "to exercise such capacity as they had." The care which an adult person is bound to exercise is said to be the care which a person of ordinary intelligence and prudence would exercise, and is not determined by the amount of intelligence which he actually possesses, unless he is *non compos mentis*; and as the law, as far as is practicable, endeavors to establish general rules of conduct, it is probable that the more accurate statement of the law for children is the one usually made, namely, that a child is to be held to the exercise of that degree of care which may reasonably be expected of children of his age, or which children of his age ordinarily exercise. This court, with more or less hesitation, in what it deems plain cases, according to common experience, has declared that the acts or conduct of an adult under the circumstances constituted, as matter of law, contributory negligence, and the question arises whether the court can make the same declaration concerning the acts or conduct of a child of tender age, who yet is so old that they cannot say, as matter of law, that he has not sufficient discretion to be permitted to act on his own judgment. We think it has been in effect decided that the same general principles govern courts in either case, although the degrees of care required are different. In *Mattey v. Whittier Machine Co.* 140 Mass. 337, the plaintiff was six years and seven months old at the time of the accident, and the opinion implies that there might be cases in which the court would hold, as matter of law, that a girl of that age was guilty of contributory negligence. See *O'Connor v. Boston & Lowell Railroad*, *ubi supra*.

In *Messenger v. Dennie*, 137 Mass. 197, and 141 Mass. 335, the plaintiff was eight years and nine months old, and the court held that there was no evidence of due care on his part, and that he could not recover, saying that "his injury was the natural consequence of his careless act." Take the case of boys in the street suddenly and intentionally running across in front of trotting horses for the purpose of showing who dares run the nearest,

or take the most risk. Suppose the driver's testimony in the case at bar is true, that the plaintiff, after having crossed safely, turned round and ran under the side of the car, would not that be contributory negligence, if the child were old enough to act alone? In instructing juries that the question for them to decide is whether the plaintiff or the plaintiff's custodian has exercised that degree of care which might reasonably be expected of a child of his age, or which is ordinarily shown by children of the same age, is it intended that they may make allowances for any spirit of recklessness or of mischief which they may think is commonly found in such children, or must they consider only their capacity of self-control, and their intelligence and ability to understand the danger, and the consequences which may reasonably be expected to follow from their conduct? It would seem that, if children unreasonably, intelligently, and intentionally run into danger, they should take the risks, and that children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and that they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless, because children are often reckless and mischievous.

If all this be true, however, and certainly it is as favorable a view of the law for the defendant as our decisions admit of, and if we assume that the plaintiff was too young to go upon the street alone, and that his conduct was such that, if he had been alone, he could not recover, yet we cannot say, as matter of law, that there was no evidence for the jury that his sister, who had the charge of him, was not exercising the care over her brother which might reasonably be expected of a child of her age, although the weight of evidence is strongly against it. The jury must have found that she did not wilfully and deliberately expose her brother to the risk, but only that, when the danger became imminent, she did not act with that coolness, prudence, and self-control which might reasonably have been expected of an older person. Her conduct up to the time the danger became imminent, the rate of speed of the car, its distance when she first saw it, and the other persons and objects in the street which might have influenced her conduct, are differently described by different witnesses. There is the same difficulty in

this case which the court found in *Mattey v. Whittier Machine Co.*, *ubi supra*.

All the facts which ought to be considered are not made sufficiently certain by the testimony to enable us to decide that there was any error of law in submitting the case to the jury. By the terms of the report, the *Verdict is to stand.*

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JAMES F. HALEY *vs.* LYMAN G. CASE & another.

Suffolk. March 25, 26. — July 3, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

If a servant, who is engaged in backing, while standing at his horses' heads, a loaded van, is directed by his master to mount the van and drive it under a gateway, over which there is a sign, and then to back down, the master being familiar with the practice of so driving vans, and the servant, though an experienced teamster, never having driven under the gateway before, and their relative positions are such that the master has better means of observation than the servant, whose attention is devoted chiefly to the management of his horses, and of seasonably appreciating the dangers attending the act, and the servant, in following the directions of the master, is injured by coming in contact with the sign, the servant may maintain an action against the master for such injury.

TORT, against Lyman G. Case and Ephraim Dodge, copartners, doing business under the firm name of Case and Dodge, for personal injuries sustained by the plaintiff while in the employ of the defendants.

At the trial in the Superior Court, before *Rockwell, J.*, it appeared that the defendants were teamsters, having a stable abutting on Perry Street, in that part of Boston formerly Charlestown; that the grade of Perry Street rises somewhat from the stable to the end of the street, where is a yard owned by one Mead, with a gateway to it from the end of Perry Street; and that over the gateway is a sign with Mead's name on it.

The plaintiff testified that he was twenty-seven years old, had been a teamster seven or eight years, and had been in the employ of the defendants for four or five years; that on the morning of January 26, 1883, he drove a caravan weighing forty-four

hundred pounds, upon which were twenty-two or twenty-three bundles of hay, weighing about two hundred and twenty pounds apiece, to Perry Street ; that on arrival he found the defendant Dodge there, who told him to drive up and unload ; that he got down and took the horses by the head to back them, when Dodge said, "Get up on your team where you belong ;" that he then got up on the hay, which was piled three bales high, and drove alongside the stable, and then turned the horses to swing the hind end of the caravan under the hay-loft door ; that, while he was doing this, Dodge said, "Hold on, where are you going ;" that he then stopped, and the pole of the caravan caught on a sled which was in the road opposite the defendants' stable ; that Dodge then opened Mead's gate, and said, "I want you to drive up there, and back down."

The testimony of this witness then continued as follows : "I started my horses with my reins. I was sitting on top of the hay, and I started my team. It was hard pulling, and I had to watch the horses. I had all I could do to watch my horses ; they could hardly stand up ; the horses were not shod right ; the shoes were all worn out, and, when I got within two or three feet of the gate, I saw that I was going to get hurt, and I tried to stop the horses but could not, and I ducked down, going underneath the fence. I got my back broke. My head went clear. The lower part of my back, about half-way or a little below, was struck by the sign which was across the gate, on the top of it. Had delivered hay at the defendants' stable before that time, — four or five times before. Had never gone under the gate or sign before. Had been accustomed to drive up and suit myself about putting my team in. Had put my team in before the same way that I was going to do that day, that is, drive right up close to the stable, swing round to the right and swing the hind end of the caravan under the door and back the forward end in ; could have done that that day. Don't remember much after I was struck by the sign ; remember being carried home. The night after the accident, Dodge called at my house and said that he was very sorry that it happened. I told him if he had let me do as I wanted to do, it never would have happened. He said, 'That is so, Jim ; I know it is my fault.' When Dodge told me to drive under the sign, he was near the gate at my forward



wheel, about fifteen or eighteen feet from the gate when he told me to drive up there."

On cross-examination, the plaintiff testified that he knew how to manage horses; that the horses he was driving were good pulling horses, not hard to manage; that there was nothing vicious about them; that he should consider that this accident was due in some way to the trouble with the horses; that their shoes were smooth and all worn out; that there was a rise in the ground there, and the horses had all they could do to get up there; that there was snow and ice on the ground; that the shoes of the horses had been smooth for a week, but he did not remember telling any one of this, and did not know that either of the defendants knew of it; that he made no objection to the manner in which the caravan was loaded, and did not know that there was any objection to it; that when the defendant Dodge told him to get on the team, he did not then consider it an improper thing to do, and did not now so consider it; that it was all right to do so; that he judged that Dodge was trying to make him back in the team the easiest way, and was intending to help him; that he intended to drive the forward part of the caravan, including where he was sitting, inside the gate, and then to back down; that the sign-board did not look to be lower than the top of the bales; that he did not think there was space to get in without stooping; that, if he had not thought he could get through all right, he would not have gone there, even though told to drive in; that Dodge was nearer the gate than he was, and could tell better whether he could get under the sign; that Dodge's attention was drawn to the gate, and his to the horses; that he looked at the gate, and thought he could get through by stooping.

He further testified as follows: "Told Mr. Dodge that if he would let me go the way I wanted to go, I would back the team in. Had to do as he told me, or I would have to get another job. When I got up to within two or three feet of the sign, I found that it was lower than I thought. I saw I was going to get hurt, and tried to stop my horses, but could not, and I ducked down under the sign. I think I could have got through if there had been six inches more height. If I had tried to stop the horses before I had got within three feet of the sign, I could not

have done so; they were pulling so hard, it took quite a while to stop them. If I had known I was going to get hurt, I could have stopped the horses within five feet of the place, or else I would have jumped off. My attention was drawn to the horses. They were pulling, and I was looking at my horses' heads, to go through this gate, and I happened to see this sign so close to me. That was when I was within a foot or two of it. If I had looked when a foot or two further off, I could have stopped them in season. When I found that I could not get through without an accident, I could not get off the load. My legs were in front of the load. If I went to jump off or start, I would get jammed somewhere else. I knew I was going to get hurt, and I thought I would get through it the best way I could. Do not know whether I fell off the load, or remained on it after it went through."

The caravan used by the plaintiff was seventeen feet in length, and the pole was nine feet, making the length of the caravan with pole attached twenty-six feet. The distance from the gate, over which the sign extended, to the hay-shed door was eight feet.

William E. Macomber testified that he was present when the accident happened, and heard Dodge tell the plaintiff to drive up there and back down; that he noticed the plaintiff when he started in the direction of the sign, and thought he could get through by stooping; that he thought so until he got within a few feet of the sign, and then he cried out to the plaintiff, and Dodge also cried out; that he had driven teams through this gate before, when he was unloading at the stable; that it was a common thing to deliver hay in that way; that it was the usual way when there were any sleighs in the road, the way he always did; that he should not think it was a proper way that day, because it was too slippery and the horses were smooth.

James C. Callahan testified that he was in the hay-loft at the time of the accident, and heard the conversation between the plaintiff and Dodge; and that he thought the plaintiff would get through without touching the sign.

George H. Rooney testified that he was on the load of hay with the plaintiff, though lower down. He corroborated the testimony of the other witnesses as to the conversation between

the plaintiff and Dodge. He also testified, on cross-examination: "Where I was, I thought Haley would get through all right. About two feet before he struck the sign, I thought he would not get through. He might if he had looked, but he was not paying any attention to the sign; he was looking at the horses."

The testimony in behalf of the defendants tended to show that it was not expected that the plaintiff would drive so far into the gateway; that, for the purpose of backing to the stable, it was only necessary to drive the horses part way under the sign; and that the plaintiff was warned of the danger from the sign when he was fifteen or twenty feet from it.

In rebuttal, the evidence for the plaintiff tended to show that, in order to back to the stable by going into Mead's yard, it was necessary for the plaintiff to go as far as he attempted to go.

At the close of the evidence, the defendants requested the judge to instruct the jury that there was no evidence upon which the plaintiff was entitled to a verdict; but the judge declined so to rule. The defendants further requested the judge to instruct the jury as follows: "1. If the plaintiff, before undertaking to drive the team into Mead's gateway, knew, or if he afterwards discovered, or if by the exercise of ordinary observation he could discover, that to drive into the gateway would involve the probability, or possibility, of driving under the sign, and that there was not sufficient space for him to drive under with safety to himself, and if, notwithstanding such knowledge, or means of knowledge, he voluntarily undertook to drive the team into the gateway, as directed by the defendants, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the defendants, in case the plaintiff's driving into the gateway caused him an injury. 2. The master is under no higher duty to provide for the safety of the servant, than the servant is to provide for his own safety. If the knowledge or the ignorance of the plaintiff, and that of the defendants, in respect of the condition of things and of the probable results of undertaking to drive the team into the gateway, for the purpose of unloading at the defendants' stable, were equal, so that both were either without fault or in equal fault, the plaintiff cannot recover."

The judge read these requests for instructions to the jury; and instructed them as follows:

"Those requests I could give to you, but I must give them with this added consideration and direction: This is not the case of an employee acting in the absence of his employer. It is a case where the plaintiff, the employee, was in the presence of his employer, and where the employer gave directions; and in that case, in giving these instructions, it is my duty to say that the relation of employer and employee is to be considered as an important relation. How important it is in each particular case is not a question of law. It may be of less, it may be of greater, effect in one case than in another, and that is to be ascertained by the jury; but the instruction as to the relation of employer and employee is to be considered by the jury as important, — as of some importance. This relation is of importance in ascertaining whether either was negligent, or whether both were negligent; but the extent of the effect of that relation in this case is for the jury to ascertain and determine; and in stating those requests, which, I think, would have been proper if the employer had not been present, and the case had not been peculiar in that respect, I must give them in connection with the other statement which I have just read to you, which is that that relation of employer and employee, the employer being present and giving directions at the time, is a matter of importance in the settlement of those questions; and the jury are to consider of how great importance, and of what effect it shall have upon the settlement of them."

The jury returned a verdict for the plaintiff, in the sum of \$5000; and the defendants alleged exceptions.

*R. M. Morse, Jr.*, for the defendants.

*W. Gaston & J. F. Dore*, for the plaintiff.

FIELD, J. It is not denied that, if Dodge was personally negligent in giving directions to the plaintiff in the performance of his work, and if the plaintiff used due care, both the defendants are liable. *Ashworth v. Stanwix*, 3 El. & El. 701.

As the plaintiff was of full age, and an experienced teamster, if the danger of driving the horses with the van under the gateway was well known to him, he cannot recover, although he was acting under the immediate personal direction of Dodge.

The fear of the plaintiff that he would be discharged from his employment, if he did not obey the orders of Dodge, his employer, would not justify him in running a risk which was well known to him, and then, if injured, in recovering damages from his employer. *Russell v. Tillotson*, 140 Mass. 201. *Taylor v. Carew Manuf. Co.* 140 Mass. 150. *Leary v. Boston & Albany Railroad*, 139 Mass. 580. *Moulton v. Gage*, 138 Mass. 390. *Williams v. Churchill*, 137 Mass. 243.

The principle is said to be, that, "where the servant has as good an opportunity as the master of ascertaining and obviating the danger for himself, he will have no recourse against the latter." *Fraser's Master and Servant* (3d ed.) 176. See also *Woodley v. Metropolitan District Railway*, 2 Ex. D. 384; *Ogden v. Rummens*, 3 F. & F. 751.

From the testimony, it was competent for the jury to find that the defendant Dodge assumed the personal direction and control of the plaintiff in determining where the team should be driven, and that he was familiar with the practice of driving loaded vans under the gateway; that the plaintiff had never driven under the gateway before; that the danger was not obvious from the place where the plaintiff started his team, in any such sense that it was not a reasonable opinion from observation at this place that he could drive through the gateway in safety; that the plaintiff's attention was necessarily chiefly devoted to the management of the horses, and that he did not discover the danger until it was too late to save himself; and that the defendant had better means of observation, and of seasonably appreciating the danger, and either did not warn the plaintiff at all, or warned him when it was too late. On such findings, we cannot say that the plaintiff was not in the exercise of due care, or that the defendant was. The test is not only what each knew, but what each reasonably ought to have known, concerning the risk; and we cannot say that identically the same duty rested on the servant and on the master seasonably to ascertain the extent of the danger involved in performing the work in the manner ordered by the master. If the master personally interferes in the performance of work, and, in consequence of this negligence, a servant is injured, the master is liable, unless the carelessness of the servant is a defence. *Roberts v. Smith*, 2 H. & N. 213.

And, when the master undertakes to direct specifically the performance of work in a particular manner, we cannot say, as matter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the vigilance which otherwise would be incumbent upon him. The servant's attention must be principally directed to the performance of the work in the manner in which he is ordered to perform it, and he may be in a less favorable position to see and judge of the surrounding dangers; and, when he is suddenly called upon to perform a piece of work in a particular manner, under the eye of his employer, he may not reasonably have time for the most careful observation.

This court has perhaps recognized that the servant may put some reliance upon the master, when he assumes control of the work and gives specific orders; and that there is not precisely the same obligation resting upon each to ascertain what the dangers are. In *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 585, although the case was decided on the ground that the servant was incapable of understanding and appreciating the danger to which he was exposed, and that the employer set him to work without properly instructing him in regard to his work, and the dangers attending it, the court say: "Some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers."

In *Atlas Engine Works v. Randall*, 100 Ind. 293, it is said, "If the attention of the appellee had been, as in the Massachusetts case, withdrawn from the source of danger by the requirements of his employment, the case would involve considerations which are conspicuously absent."

*Keegan v. Kavanaugh*, 62 Mo. 230, is the case of a hod-carrier, who, in obedience to a positive order of his master, went down to build a stone wall at the foot of an embankment of earth, which was not shored or propped up, and which fell upon the plaintiff. The court say, "If the risk is such as to be perfectly obvious to the sense of any man, whether servant or master, then the servant assumes the risk;" but that "the superior information of the master was relied on, and his better means of information

as to the character of the ground;" and a verdict for the plaintiff was sustained.

In *Lee v. Woolsey*, 110 Penn. St. , it is said, "If an employee is in haste called upon to execute an order requiring prompt attention, he is not to be presumed necessarily to recollect a defect in machinery, or a particular danger connected with his employment, so as to avoid it."

The plaintiff in this case was an experienced teamster, but he may not have had the same experience as the defendant Dodge of the possibility of driving the loaded van safely under the gateway. The more important matter is, however, that he might not have had the same opportunity of estimating the danger, and from the nature of his employment he was required to devote his attention principally to the management of his horses, while his master had assumed the responsibility of directing where the plaintiff should drive, and was free to observe carefully all the dangers which the plaintiff might incur in executing his orders. We think that the requests for instructions were properly modified by the consideration of the fact that the plaintiff was acting in the presence and under the directions of one of the defendants, who was his master. If the charge in this respect is not so definite as might be desired, it was not erroneous or misleading.

*Exceptions overruled.*

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HERBERT E. WEBSTER, administrator, *vs.* CITY OF LOWELL.

Middlesex. March 26. — July 3, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

At the trial of a petition for the assessment of damages occasioned to land of the petitioner's intestate by the discontinuance of a street, it appeared that the intestate acquired title to the land under a deed from the petitioner. The petitioner was asked, on cross-examination, if, at any subsequent time before the death of his intestate, he owned said land, or had received a deed of it from any person; to which he answered in the negative. He was then asked if he did not, after the execution of the deed by him to his intestate, and about the year 1880, give a deed of said land to one R., and in said deed covenant that he was the sole owner thereof; to which he replied that he did not give such a deed, and that, if he did, it was a mistake. The respondent, for the purpose of

contradicting the petitioner's testimony, then offered in evidence the record of a deed of said land from the petitioner to R., given in 1880, and covenanting that the grantor was the sole owner in fee of the land. No objection was made that the original deed was not produced. *Held*, that the evidence offered was properly excluded.

At the trial of a petition for the assessment of damages occasioned to land by the discontinuance of a portion of a street, the petitioner contended that he had acquired by prescription a right of way over a passageway throughout its entire length from said street to a parallel street. The judge refused to rule, as requested by the respondent, that, in estimating the damages, "no part of the discontinued portion of said street except that on which said passageway abutted should be taken into account." *Held*, that the respondent had no ground of exception.

At the trial of a petition for the assessment of damages occasioned to land by the discontinuance of a portion of H. Street, there was evidence of the existence of a passageway from H. Street to T. Street, a parallel street; that the petitioner's land abutted on H. Street and on a portion of the passageway; and that gates and other barriers at different times had been erected across the passageway at places between the two streets, or at the T. Street end; but no witness testified that any gate or other barrier had ever been placed in that part of the passageway between H. Street and the rear of the petitioner's premises, or that his use of the way had ever been interrupted. The judge instructed the jury, that, if they found that the petitioner, as the owner of the land, had acquired a right of way to and from H. Street over the land which abutted upon the discontinued portion of H. Street, "it was immaterial whether he had a right to pass to and from T. Street or not." *Held*, that the respondent had no ground of exception.

At the trial of a petition for the assessment of damages occasioned to land by the discontinuance of a portion of a street, the petitioner contended that he had acquired by prescription a right of way over a passageway leading from said street to a parallel street. There was evidence of an open and adverse use of the way under a claim of right for more than twenty years by the owners of the land described in the petition; and there was evidence for the respondent that the owners of the servient estate had from time to time interrupted the use of the way by the petitioner and his predecessors in title. After the evidence on both sides was closed, the respondent asked the judge to rule that there was not sufficient evidence to warrant the petitioner in going to the jury. *Held*, that this request was rightly refused.

A petition for the assessment of damages occasioned to land by the discontinuance of a portion of H. Street alleged that the land was situated on the northeasterly side of H. Street in a certain city, (describing it by metes and bounds), "together with a passageway upon the northerly side of the premises." At the trial, the petitioner contended that he had acquired by prescription a right of way over a passageway throughout its entire length from H. Street to a parallel street. *Held*, that proof of a right of way only to and from H. Street was not inconsistent with the allegation in the petition.

If a private way is laid out for the use of the tenants of an estate abutting thereon, the owner of another estate also abutting thereon may acquire a right of way therein by adverse use, although his use is of the same character as that of said tenants, and does not interfere with their use.

On the issue whether a right of way had been acquired by the petitioner by adverse use, the respondent requested the judge to rule, that, if the way was laid



out for the benefit of an estate other than that of the petitioner, and was used by the tenants of such estate, and by those having dealings with them, and was also so used continuously, with the knowledge and consent of the owner, by all persons having occasion to pass through the same, including the petitioner, the petitioner could not acquire a right of way over the same by adverse use. The judge said that, if by the terms "knowledge and consent" was meant an express consent or permission, as distinguished from a silent acquiescence in or failure to object to an asserted right by the petitioner, the court would grant the request; otherwise, it would be refused. *Held*, that the respondent had no ground of exception.

If the owner of land, abutting on a street in a city, has acquired a right of way by adverse use over a strip of land at the side of his lot, which extends to the street, he may maintain a petition against the city for the assessment of damages occasioned by the discontinuing of the street opposite such strip of land, although the owner of such strip owns the fee in the part of the street which is discontinued.

PETITION to the Superior Court, by the administrator of the estate of Mary E. Webster, for a jury to assess the damages alleged to have been occasioned to said estate by the discontinuance of a portion of Hanover Street in Lowell. The petition alleged that said Mary E. Webster was, in her lifetime, and had been from July 10, 1875, seised and possessed of certain real estate, to wit, a certain parcel of land with the buildings thereon and the passageway appurtenant thereto, situated on the north-easterly side of Hanover Street, a public street in the city of Lowell, (then followed a description of the land by metes and bounds,) together with a passageway upon the northerly side of the premises; and that while the said intestate was the owner and seised in fee of said land and buildings, and during her lifetime, the city of Lowell, by a resolution duly passed by the city council thereof on October 25, 1881, discontinued a portion of Hanover Street, upon which said portion so discontinued said real estate abutted; and that by so discontinuing said portion of Hanover Street, as set forth in the resolution, Mary E. Webster suffered damage in and to her said estate.

Trial in the Superior Court, before *Knowlton, J.*, who allowed a bill of exceptions, in substance as follows:

It appeared that Hanover Street was a public street in Lowell, crossing Moody Street, a public street and main thoroughfare, at about a right angle therewith, and extending therefrom northerly about three hundred and twelve feet to the premises of the Tremont and Suffolk Mills, a manufacturing corporation, in

Lowell, and was duly laid out as a public street on December 13, 1853; that the real estate owned by the petitioner's intestate was situated on the easterly side of Hanover Street, at a point lying between Moody Street and the premises of the Tremont and Suffolk Mills, and having a frontage on said street of thirty-two feet; that between said real estate and Moody Street, and on the same side of Hanover Street, there was other land occupied by buildings owned by various other persons; and that, on the side of Hanover Street opposite to the real estate of the petitioner's intestate, there were no buildings of any kind, but there was a canal, which passed under Moody Street, and thence, by the westerly line of Hanover Street, to the premises of the Tremont and Suffolk Mills.

On October 25, 1881, the city council of Lowell passed a resolution, as follows: "Resolved, that the portion of Hanover Street from a point opposite the southwesterly side of the Tremont and Suffolk Mills' new storehouse, on the easterly side of said street, and extending eighty-five and eight tenths feet in a northeasterly direction to the terminus of said street, as laid out by resolution passed December 13, 1853, be, and the same is hereby, discontinued as a public highway." No question was made as to the validity of the proceedings for the discontinuance of this street. The real estate of the petitioner's intestate did not abut on the discontinued portion of Hanover Street, but it lay to the south of the line of discontinuance, as fixed in said resolution, by about eight feet and eleven inches, and towards Moody Street; but the petitioner contended that his intestate, and those under whom she claimed, had acquired by prescription, and not otherwise, a right of way, of the width of about twelve feet and of the length of about one hundred and eighty feet, over the land lying to the north of her real estate, throughout its entire length from Hanover Street to Tremont Street, a street running parallel with Hanover Street, and also extending northerly from Moody Street, and that the outlet of said way would be narrowed from about twelve feet to about eight feet and one inch by the discontinuance of that portion of Hanover Street discontinued, and that a strip of said passageway lying on the side thereof farthest from the northerly line of the premises of the petitioner's intestate, of the width of about three feet

and eleven inches, abutted on that part of Hanover Street discontinued.

It appeared that the land over which the petitioner contended that his intestate, and those under whom she claimed, had acquired a right of way, was owned in the year 1845 by the proprietors of the Tremont Mills, a manufacturing corporation established in Lowell; that it was a part of a large tract of land then owned by said proprietors, all of which was then vacant and unoccupied by any buildings, as was the land of the petitioner's intestate at that time. In the year 1846, the proprietors of the Tremont Mills built a brick tenement block on their land, extending from Hanover Street to Tremont Street; in the rear of said block were yards connected therewith, and still farther in the rear of said block was a continuous row of sheds connected therewith, of the same length as said block and running parallel with it; the remainder of their land lying between said row of sheds and the northerly line of the premises of the petitioner's intestate and the northerly line of the land adjoining said last-named premises, and lying between the same and Tremont Street, was left open by said proprietors, and, from the time said block was built, the land so left open constituted a passageway, and was always used by the tenants and employees of said proprietors, and of said Tremont and Suffolk Mills, their grantee, dwelling in said brick block, to pass and repass through the same to and from their respective tenements, and by those having business or dealings with them, and by all persons having occasion to pass and repass through the same. On the land of the petitioner's intestate a dwelling-house was erected by one of her grantors after said brick block was built. The line of said dwelling-house, as the same extended back from Hanover Street towards the rear of said land, as well as the line of a shed which was attached thereto in the rear, was within two feet and three fourths of an inch of the northerly line of said land, thus leaving a strip of said land two feet and three fourths of an inch wide on the northerly side of said dwelling-house, extending from the front of the petitioner's intestate's land on Hanover Street to the rear thereof, and being a part thereof, and running parallel with said strip of land so left open by said proprietors, which said strip two feet and three fourths of an inch wide always remained open

and unenclosed. On the southerly side of said dwelling-house no structure of any kind was ever erected, and access was and could be had from Hanover Street to the rear of the premises over the land lying between the southerly line of said dwelling-house and the southerly line of the petitioner's intestate's land so unoccupied, which was of sufficient width to admit the passage of a horse and wagon.

The petitioner introduced evidence tending to show that, from about 1854, there was a door on the northerly side of said dwelling-house, with a door-step about eighteen inches wide in front of the same resting on the ground; that beyond that and farther towards the rear of the premises was a gate in a shed attached to said dwelling-house, which when opened swung out from the shed four or five feet, and in part over said passageway; that the owners and occupants of said dwelling-house, during the time said door, and gate had been as above stated, used the same in passing to and from said house and shed, and had during said time passed to and from the same over said strip two feet and three fourths of an inch wide, and over and through said passageway of said proprietors, so left open, its entire length from Hanover Street to Tremont Street; that all persons having business or dealings with them had also used said passageway and said strip, both for travel by teams and on foot, to pass and repass through and over the same to and from said dwelling-house since said time; that the upstairs tenement in said dwelling-house was reached only by means of said door during a large part of the time since said house was built; that the larger part of the business and dealings of the several owners and occupants had been in the direction of Tremont Street; and that thereby the travel through and the use of said passageway were greater by said owners and occupants to and from Tremont Street than to and from Hanover Street, but the petitioner's intestate and her grantors had used the passageway continuously in both directions ever since the house was built, except as hereinafter appears.

All of the petitioner's witnesses testified that the use made of said passageway by the several owners and occupants of said dwelling-house had not been different from the use made of the same by the tenants and employees of the proprietors of the

Tremont Mills, and of their grantee, the Tremont and Suffolk Mills, dwelling in said brick block; and that such use had in no way interfered with, interrupted, or abridged the use made of the same by said tenants and employees.

One of the petitioner's witnesses, Ebenezer D. Webster, testified, on cross-examination, that, about the year 1855, Charles L. Tilden, the agent of the proprietors of the Tremont Mills, put up a fence or gate across said passageway in about the middle thereof, but beyond the rear line of the petitioner's intestate's land towards Tremont Street, and that the same remained closed for a short time; but that, although he had been familiar with said passageway ever since 1854, he knew of no other gate or fence being placed across said way except one in 1880, hereinafter referred to.

Another of the petitioner's witnesses testified that, in the year 1854 or 1855, Tilden put a gate or fence across said passageway, about midway in the same, and that it was kept up and closed for a time, and prevented travel through said passageway while so kept up and closed; but that, although he had been familiar with the said passageway ever since 1845, and lived near by the same, he knew of no other gate or fence being placed across said way except in 1880, as hereinafter referred to.

Of the respondent's witnesses, one Isaac H. Demming testified that he lived in said brick block from 1847 to 1868, and that during said time he was in the employ of the proprietors of the Tremont Mills; that, between 1856 and 1858, Tilden, whom he knew as the agent of said proprietors, put up a gate across said way, said gate being attached to said row of sheds on the one side and closed against a fence on the opposite side of said way, and kept the same in that position and locked for several weeks; that Tilden notified the tenants in said brick block, that, if they desired to open the gate for any purpose, they could get the key to the same at the counting-room of said proprietors; that in the year 1855 he heard a conversation between the agent of said proprietors, whom he knew, and one George L. Putnam, who then owned the premises of the petitioner's intestate, and under whom she claimed, in which conversation Putnam complained of certain acts of third persons with whom said agent was connected in business; that, in answer to Putnam, the agent said

substantially, "If you say much about that, I will build a fence here," pointing to said passageway, "as high as the eaves of your house," and to this Putnam made no reply; and that during the time the witness lived in said brick block there was on his shed, which was the end shed in said row, abutting on said Hanover Street, a board sign with the words "Private Way" painted thereon.

Another of the respondent's witnesses, one W. C. Lamson, testified that he lived in said brick block from about 1858 to 1869; that, in 1860 or 1861, a gate was put up across said passageway and kept closed from two to four weeks; that at each end of said passageway there were signs or notices on said row of sheds, bearing the words, "Private Way and dangerous, by order of the Mayor and Aldermen," during the time he lived in said block.

Another of the respondent's witnesses, one John Southwick, testified that he lived in said brick block, as one of the tenants and employees of said proprietors, from about 1860 to 1879; that, about the year 1860 or 1861, a gate or fence was placed across said way, about middle way thereof, and kept closed for from two to four weeks; that the hinges of said gate were attached to said row of sheds, and that said gate was shut against a post on the opposite side of the passageway; that the gate was put up by Tilden, who was then the agent of said proprietors; that during the time the witness lived in said brick block there were notices attached to both ends of said row of sheds in said passageway, bearing the words "Private Way"; and that said notices were put up by Tilden.

Another of the respondent's witnesses, one Oliver Flint, testified that he was familiar with said passageway, and had been for many years; that, about the year 1860, there was a gate or fence across the same; and that said gate or fence was kept closed across said passageway for a considerable time, and prevented travel through the same.

Another of the respondent's witnesses, one Charles L. Belden, testified that, in 1862, there was a gate across said passageway; that the same was closed at times, and was frequently shut at night; and that the same, when so closed, prevented travel through said passageway.

There was no evidence that the petitioner's intestate, or those under whom she claimed, or any persons acting for her or them, had ever placed a gate, fence, or barrier of any kind across said passageway, and there was no other evidence than as above stated relative to gates, fences, or barriers across said way ; but no witness testified that any gate or other barrier had ever been placed in that part of the passageway between Hanover Street and the rear of the premises of the petitioner's intestate, or that her use of that portion of the passageway, or that of former owners of her estate, had ever been interrupted.

It was not disputed that, in the year 1880, the Tremont and Suffolk Mills, the grantee of said proprietors, placed and has ever since maintained a gate across said passageway at the Tremont Street end thereof, and has kept the same closed.

There was evidence introduced by both parties tending to show that there were vaults projecting from said row of sheds into said passageway, at intervals, throughout its entire length. Some of the petitioner's witnesses testified that said vaults were of the height of about ten inches above the surface of said passageway, and projected into it from two and one half to three feet. Some of the respondent's witnesses testified that said vaults were of the height of eighteen inches above the ground, and projected into said passageway four feet.

It was not disputed that said proprietors and their grantee, the Tremont and Suffolk Mills, had always cleaned said passageway, and kept it in repair.

There were no other buildings on the side of said passageway, opposite said row of sheds, throughout its entire length, than said dwelling-house and the shed attached thereto.

The petitioner's intestate acquired her title to said real estate under a deed from the petitioner to her, dated December 1, 1876. The petitioner, on cross-examination, was asked, as bearing on the question of his intestate's title to said estate, if, at any subsequent time before the death of his intestate, he owned said estate, or had received a deed of it from any person ; to which he answered in the negative. He was then asked, on cross-examination, if he did not, after the execution of said deed by him to his intestate, and about the year 1880, give a deed of said estate to one Naomi Richards, and in said deed covenant that he was

the sole owner thereof; to which he replied, that he did not give such a deed, that, if he did give such a deed and so covenant, it was a mistake, but that he knew that he did not give such a deed and so covenant.

The petitioner expressly waived all objections to the production in evidence of a record copy of said deed to Naomi Richards, upon the ground that the original should be produced, but did not waive objections to the admission thereof on any other ground; and the respondent called as a witness the register of deeds for the district in which said real estate is situated, and offered to show by him and the records in his custody, for the purpose of contradicting the petitioner in his testimony, that the petitioner, in the year 1880, which was before the death of his intestate, made to one Naomi Richards a deed of said real estate, and covenanted therein with her that he was the sole owner in fee of said real estate; but the judge excluded the evidence.

One of the petitioner's witnesses, who was called and qualified as an expert in real estate values, testified to the amount of damage in his opinion caused by the alleged discontinuance of Hanover Street, and stated that, in forming such opinion, he took into his calculations that part of the alleged discontinued portion of Hanover Street lying beyond the passageway towards the northerly end of Hanover Street.

The respondent requested the judge to rule that, in estimating the damages alleged to have been caused as aforesaid, no part of the discontinued portion of said Hanover Street except that on which said passageway abutted should be taken into account. The judge refused so to rule.

After the evidence on both sides was closed, the respondent requested the judge to rule, upon the above evidence, that the petitioner had failed to maintain his petition, having introduced no sufficient evidence, as the respondent contended, to warrant him in going to the jury upon the question of its liability to respond in damages for the discontinuance of Hanover Street. The judge refused so to rule.

The judge submitted to the jury, among other things, the question whether the petitioner's intestate had acquired a right of way by prescription over that part of the passageway which



abutted on the discontinued portion of Hanover Street ; and instructed them that, if they found that gates and barriers were placed across said passageway, between the premises of the petitioner's intestate and Tremont Street, by the owners of the land over which it passed, at various times, as contended by the respondent, that fact might be considered and given such weight as they thought it entitled to upon the question whether the petitioner's intestate had acquired a right of way over that portion of the passageway abutting upon Hanover Street ; but, if they found that she had acquired such right over that land which abutted upon the discontinued portion of Hanover Street, it was immaterial whether she had a right to pass to and from Tremont Street or not.

The respondent requested the judge to instruct the jury as follows: "1. If the jury find that, in 1854 or 1855, a fence or gate was placed across the way in question by Tilden, the agent of the owners of the fee, and that again, in 1861 or 1862, a fence or gate was again placed across the way in question by the agent of said proprietors, and that a fence or gate was placed across the way in 1880 by the said proprietors or their agents, then the use of the way by the petitioner's intestate and her grantors was permissive, and not adverse, and the petitioner is not entitled to damages. 2. If the jury find that the way was laid out by the proprietors of the Tremont Mills for the use of their tenants and employees, and that it has been used by such tenants and employees, and that the use of the way by the owners and tenants of the Webster estate has been of the same character, and has not been such as to interfere with or abridge the use of the way by the tenants and employees of the Tremont Mills, then such use was permissive, and not adverse, and the petitioner cannot recover. 3. In estimating the damages, if any, the jury are not to consider that part of the discontinued portion of the street which lies beyond the farther line of the passageway, opposite the Webster house. 4. If the jury find that the way in question was opened in the year 1846 by the owners of the land over which it passed, when they built their brick block of tenement houses opening through the yards and sheds connected therewith into said way, and that from that time forward said way had been used continuously by the

tenants of said owners living in said block, and the tenants of those claiming under said owners, to pass and repass through the same, and that the said way had always been used by those having occasion to call on said tenants and at their respective tenements for purposes of business or otherwise, and that the way had been used by all persons having occasion to pass and repass through the same, and that, in the year 1854 or 1855, the agent or agents of the owners of said land, in the exercise of a claim of right, placed a gate, barrier, or fence across the way, and that thereby the same was closed to travel some days or weeks, and that, in the year 1860, 1861, or 1862, the agent or agents of said owners, in the exercise of a claim of right, again placed a gate, barrier, or fence across said way, and that the same was thereby closed to travel for a time, or at intervals of time, and that the agent or agents of those claiming under said owners, in the year 1880, in the exercise of a claim of right, placed a gate or fence across said way, and that the same has thereby been closed to travel ever since, then neither the petitioner's intestate, nor those under whom she claimed, could have acquired a right of way over the land of said owners constituting the way by adverse use of the same as a way, although she and they may have used the way during the entire period of its existence, except as aforesaid, in the same manner and for the same purposes as the said tenants and other persons used it.

5. If the jury find that the way in question was opened by the owners of the land over which it passed, in the year 1846, for the accommodation of their tenants living in their brick block of tenement houses opening into the same through the yards and sheds connected therewith, and of those having business or dealings with said tenants, and that from that time forward said way was so used continuously by said tenants and the tenants of those claiming under said owners, and by such persons having business or dealings with them, and was also so used continuously, with the knowledge and consent of said owners and of those claiming under them, by all persons having occasion to pass and repass through the same, including the petitioner's intestate and those under whom she claimed, then neither the petitioner's intestate, nor those under whom she claimed, could have acquired a right of way in and over the same by adverse

use. 6. If the jury find that the petitioner's intestate had acquired a right of way over the premises in question, as claimed by the petitioner in this action, then the resolution of discontinuance passed by the city council of the city of Lowell of that part of said Hanover Street to be discontinued by said resolution would not abridge or narrow said right of way from said Hanover Street, if, as claimed by the petitioner at the trial, the said portion of said Hanover Street so discontinued is the property of the Tremont and Suffolk Mills, the grantees of the original owners of the land over which said way passed, and of the land in the discontinued part of said Hanover Street, against which said original owners and those claiming under them the petitioner claims that his intestate acquired the said right of way by adverse use."

The judge refused to give the instructions requested, but said, with respect to the fifth, that if, by the terms "knowledge and consent" therein, was meant an express consent or permission to the petitioner's intestate, and those under whom she claimed, or a license or permission to her and them, as distinguished from a silent acquiescence in or failure to object in some manner to an asserted right by her and them, then he would give the same; otherwise, the same was refused.

The jury were instructed, in terms not excepted to, as to what must be shown to establish a right by prescription, and were told that the petitioner could not recover unless he had proved that the use relied upon was adverse, and not permissive; and the term "adverse" was explained. They were also instructed that, in order to recover, the petitioner must show that his intestate was the owner of an interest in the land abutting upon the discontinued portion of Hanover Street; and that, in assessing damages, they would only consider such detriment as was special and peculiar to the estate of the petitioner's intestate, as distinguished from any general damage to the estates in the vicinity growing out of the discontinuance of the street.

The jury returned a verdict for the petitioner; and the respondent alleged exceptions.

*C. S. Lilley & H. A. Brown*, for the respondent.

*F. T. Greenhalge*, for the petitioner.

FIELD, J. Hanover Street, which crosses Moody Street at a right angle, and which runs nearly north and south, at its northerly end was a *cul de sac*, and the city of Lowell discontinued a portion of it as a highway, measuring eighty-five and eight tenths feet southerly from the northerly end, so that, after the discontinuance, the northerly end of the street was a line drawn across the street from "the southwesterly side of the Tremont and Suffolk Mills' new storehouse, on the easterly side of said street." The land of Mary E. Webster, of whose estate the petitioner is administrator, lies southerly of the land of the Tremont and Suffolk Mills, and abuts on Hanover Street on the easterly side about eight feet and eleven inches "south of the line of discontinuance." The petitioner contended that his intestate, and those under whom she claimed, had acquired, by prescription and not otherwise, a right of way, of the width of about twelve feet and of the length of about one hundred and eighty feet, over the land lying to the north of her said real estate, throughout its entire length from Hanover Street to Tremont Street, a street running parallel with Hanover Street, and also extending northerly from Moody Street, and that the outlet of said way would be narrowed from about twelve feet to about eight feet and one inch by the discontinuance. If there were such a right of way appurtenant to the estate of Mary E. Webster, it must have run easterly from Hanover Street, and, before the discontinuance, those owning the estate could have used the northerly part of Hanover Street, and a way about twelve feet wide, but, after the discontinuance, the way where it entered Hanover Street was only about eight feet and one inch wide.

The first exception is to the refusal of the court to admit as evidence the record copy of a deed from the petitioner to one Naomi Richards, in 1880, of the premises set out in the petition, and which he had conveyed to Mary E. Webster in 1876. The petitioner was a witness, and, on cross-examination, had denied that, after he gave a deed to Mary E. Webster, under which he, as the administrator of her estate, claimed to maintain the petition, he gave a deed to Richards. The deed recorded contained a covenant that the grantor was the sole owner in fee of the estate. No objection was taken that the original deed was not produced. If the petitioner conveyed the estate to Mary E. Webster in 1876,

and the deed was properly recorded, any conveyance which he might make or attempt to make afterwards would not affect her title, or convey any title to the grantee. If the execution and delivery of the deed to Mary E. Webster in 1876 was disputed, and he had testified to its execution and delivery, evidence of any acts of his inconsistent with this testimony might be given by way of contradiction, as affecting the credibility of his testimony. We cannot say that there might not be such a state of facts that the evidence here offered would be held to be of this character. But no such facts appear in the exceptions. The petitioner was first asked, on cross-examination, if, at any time subsequent to the deed to Mary E. Webster, and before her death, he had owned the estate, or had received a deed of it from any other person, to which he answered in the negative. He was then asked if he had not, about the year 1880, given a deed of the estate to one Richards, and in said deed covenanted that he was sole owner; to which he answered, that he had not given such a deed, and that, if he had, it was a mistake. It was for the purpose of contradicting him in his testimony that the evidence objected to was offered. It does not appear to have been disputed that the petitioner executed and delivered to Mary E. Webster a valid deed of the estate in 1876, or that this deed was not properly recorded, and it is immaterial whether, after this, he gave a deed of it to any other person; and evidence is inadmissible to contradict a witness upon an immaterial matter. That the witness, in the capacity of administrator of the estate of Mrs. Webster, is the petitioner, does not make acts done by him on his own account during the life of Mrs. Webster competent evidence against her estate.

The exception, that the court refused to rule that, in estimating the damages, "no part of the discontinued portion of said Hanover Street except that on which said passageway abutted should be taken into account," must be overruled. Owners of land abutting upon a street have the right to the use of the street in connection with their land throughout its entire length; they can recover only special damages, but we do not see how it affords any aid in measuring these damages to assume that they are the same as if Hanover Street had, before the discontinuance, extended only to the northerly boundary of the passageway,

or as if the city council had discontinued only a strip across the street three feet and eleven inches wide, and bounded on the north by the northerly line of the passageway.

The exception to the refusal to rule that there was not sufficient evidence to warrant the petitioner in going to the jury, is overruled. We are not satisfied that the whole evidence is reported, and the evidence for the respondent, that the owners of the servient estate had from time to time interrupted the use of the way by the petitioner and her predecessors in title was for the jury, and there was some evidence of an open and adverse use, under a claim of right, for more than twenty years by the owners of the estate described in the petition. There was evidence of a passageway from Hanover Street to Tremont Street, and that gates and other barriers, at different times, had been erected across the passageway at places between the two streets, or at the Tremont Street end; but "no witness testified that any gate or other barrier had ever been placed in that part of the passageway between Hanover Street and the rear of the premises of the petitioner's intestate, or that her use of that portion of the passageway, or that of former owners of her estate, had ever been interrupted." It is possible that a right of way may have been acquired to and from Hanover Street, and from and to all parts of the premises described in the petition, and that no right of way had been acquired from these premises to Tremont Street, or through the passageway from street to street. The court instructed the jury, in substance, that if they found that Mrs. Webster, as the owner of the estate, had acquired a right of way to and from Hanover Street over the land which abutted upon the discontinued portion of Hanover Street, "it was immaterial whether she had a right to pass to and from Tremont Street or not." This ruling apparently was given, not as affecting the damages, but the right of action, and we shall so consider it.

One contention of the respondent in his brief is, that "the petitioner, having claimed a right of way in the passageway throughout its entire length from Hanover Street to Tremont Street, and having relied upon a particular use of said passageway to prove such right, could not, if he failed to establish such right, rely upon the very same use to establish a right

in a part only of said passageway." The petition describes the premises by metes and bounds, "together with a passageway upon the northerly side of the premises." By the claim of the petitioner, the respondent must mean his contention at the trial in regard to the nature and extent of the right of way. The respondent relies upon the rule of the common law, that prescriptions presumed to be founded upon grants which have been lost must be strictly proved as alleged. The petition is so general, that proof of a right of way only to and from Hanover Street is not inconsistent with the allegation concerning the passageway; and no objection has been taken to the form of the petition. We have not adopted in our practice, under the statutes providing for the assessment of damages for discontinuing a highway, all the technical rules of pleading at common law; and the proof, in any view of it, was not inconsistent with the petition.

Of the first request for instructions it may be said that it asserts that the effect of the interruptions to the adverse use by the erection of the gates or fences is to make the use permissive, while the effect in fact is to destroy the continuity of the use by the assertion of the paramount right of the owner over the land. If the request had been granted, the petitioner would not have been entitled to damages, if he had only proved a right of way from the premises to Hanover Street, on which there was no evidence that any fence, gates, or barrier had been placed.

The second request ought not to have been granted; because, although the tenants and employees of the Suffolk and Tremont Mills might have used the way permissively, the owners and tenants of the Webster estate might have used it adversely. See *Fitchburg Railroad v. Page*, 131 Mass. 391.

The third request for instructions to the jury is a repetition of the first request for a ruling during the trial.

The fourth request is substantially made up of the first and second combined, with some additional facts. The effect of interruptions to the use of the way, by fences and other barriers between the premises described in the petition and Tremont Street, upon the question whether a right of way had been acquired from the premises to Hanover Street, was rightly left to the jury. Whether the jury found that there had been any such

interruptions, we do not know. To acquire a right of way by prescription, there must be an adverse use of the way for twenty years, and this use must be continuous, and as of right. If the use is interrupted by the owner of the land, by obstructions placed upon it in the exercise of his right to prevent the use of the way, the continuity of the use is broken. Whether the interruption is acquiesced in by the claimant of the right of way in such manner that the subsequent use must be regarded as permissive, is a question for the jury upon the facts. As the exceptions find that "the jury were instructed, in terms not excepted to, as to what must be shown to establish a right by prescription," we cannot suppose that the plaintiff's fourth request was intended to be directed to the necessity of an uninterrupted use for twenty years in order to establish a right of way by prescription, or that the instructions given by the court on this point were not satisfactory to the respondent; and it must be considered that this request was properly refused, for the reasons given in considering the first and second requests.

The fifth request was properly modified by the court.

The sixth request was rightly refused. A private right of way could not be acquired in Hanover Street, while it was a public highway, by using the street for the purposes of travel; and, on the discontinuance of a part of the street, the owners of the land held it discharged from the public easement, and there was then no private right of way over it which was appurtenant to the land described in the petition.

*Exceptions overruled.*



ALEXANDER G. CUMNOCK, executor, *vs.* INSTITUTION FOR  
SAVINGS IN NEWBURYPORT.

Suffolk. March 30. — July 3, 1886. W. ALLEN & HOLMES, JJ., absent.

A declaration alleged that the plaintiff delivered to the defendant, to be held and safely kept by him, certain shares of stock in a corporation, as collateral security for the payment of a promissory note signed by the plaintiff, with authority to sell the same and apply the proceeds towards the payment of the note, in case of default in the payment thereof by the plaintiff; that the defendant, in consideration of such pledge and delivery by the plaintiff, promised and undertook to hold and keep said stock, and redeliver the same to the plaintiff on payment of the note; that, on or before the maturity of the note, the plaintiff, in order to provide for the payment of the note at maturity, had effected a valid contract for the sale of said stock at a certain price per share, the stock to be delivered and assigned on or after maturity of the note; that, at the maturity of the note, the plaintiff was ready and willing to pay said debt and receive back the stock, and offered to redeem the same, and demanded the same of the defendant, who informed him that the note and certificates had been lost, and that it was out of his power to return either the note or the certificates; that the defendant refused and neglected for a long time to return said certificates to the plaintiff, or permit him to redeem the same; that, by reason of said loss, refusal, and neglect, the plaintiff lost his said sale and the benefit thereof, and was deprived of his right to sell the same, as he could have done; that, about fifteen months after the maturity of the note, said stock was found by the defendant, and the debt to him discharged, and the stock received back by the plaintiff, and sold by him at a greatly diminished price, whereby he had suffered the loss of a certain sum, which was caused solely by the defendant's neglect to keep safely the property so pledged as collateral security. *Held*, on demurrer, that the declaration did not state a legal cause of action.

ACTION, alleged in the writ to be in contract or tort, in two counts. The second count, which was the only one relied on, was as follows: "And the plaintiff says that he is the executor of the will of Charles W. Freeland, late of said Boston, deceased, testate; that the said Charles W. Freeland did, in his lifetime, to wit, on June 15, 1883, for value received from said defendant corporation, make his certain writing obligatory, and deliver the same to the defendant, whereby he promised said defendant corporation to pay to it or its order the sum of \$24,000 on the fifteenth day of June, 1884, with interest semiannually; and that said Freeland did deliver unto said defendant corporation, as collateral security for said loan, to be held and safely kept by them, certain property of which he was the owner, to wit, fourteen shares of the capital stock of the Amoskeag Manufacturing

Company, a corporation organized and doing business in the State of New Hampshire; that said Freeland did also give to said defendant corporation, at their request, full and special authority to sell said collateral, and apply the proceeds towards payment of said note, in case of default in the payment thereof by him, and that said defendant corporation did then and there, in consideration of such pledge and delivery by said Freeland, promise and undertake faithfully to hold and keep said stock, and redeliver the same to the plaintiff on the satisfaction and payment of said note; that, on or before the maturity of said note, said plaintiff, in order to provide for the payment of said note at maturity, had effected a valid contract for the sale of the said stock at the rate of \$2000 per share, said stock to be delivered and assigned on or after maturity of said note, to wit, June 15, 1884; and that, before the maturity of said note, said defendant corporation notified the plaintiff of the loss by them of said note, requesting a new acknowledgment of said indebtedness, which the said plaintiff gave. And the plaintiff says that afterwards, to wit, on the fifteenth day of June, 1884, he was ready and willing to pay the said indebtedness, and receive back the stock aforesaid, and offered to redeem the same, and demanded the same of the said defendant corporation, but was then informed by said defendant that said certificates also had been by them lost, and that it was out of their power so to return either said note or said certificates of stock, and said defendant refused and neglected, and for a long time continued to refuse and neglect, to return said certificates of stock to said plaintiff, or permit him to redeem the same; that, by reason of said loss, refusal, and neglect, said plaintiff lost his said sale and the benefit thereof, and was deprived of his right to sell the same as he could have done, and that the market value of said stock was on June 15, 1884, \$2000 per share; that since said date of maturity, to wit, on or about September, 1885, said stock was found by said defendant corporation, and said debt to said defendant discharged, and said stock received back by said plaintiff, and sold by him at a greatly diminished figure, being the best price that he could obtain, to wit, at \$1950 per share, whereby the estate of said testator has suffered the loss of \$700, which the plaintiff says was caused solely by the neglect of said

defendant to safely keep said property so pledged as collateral as aforesaid. Wherefore he says that the defendant owes him said sum of \$700, and interest thereon from the twenty-fourth day of October, 1885."

The defendant demurred to the declaration, on the ground that it did not set forth a legal cause of action. The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court.

*F. Rackemann*, for the plaintiff.

*D. L. Withington*, for the defendant.

FIELD, J. The second count apparently proceeds upon the theory that the payment of the note and the return of the stock were to be concurrent acts. But the contract of the defendant was to keep the certificates of stock with due care, and to return them to the plaintiff, if the note was paid at maturity, or when, after maturity, the note was paid, unless the stock was meanwhile lawfully sold to pay the debt. The contract of pledge is collateral to the contract to pay the debt. The promise is to return the property pledged when the debt is paid. The pledgee can maintain an action to recover the debt, without any offer to restore the property pledged; *Taylor v. Cheever*, 6 Gray, 146; and he can maintain an action for money lent after he has converted the property pledged by an unlawful sale, and can recover the amount of the debt less the amount realized by the sale, if the defendant pleads this in set-off. *Fay v. Gray*, 124 Mass. 500.

Notwithstanding what was said in *Cortelyou v. Lansing*, 2 Caines Cas. 200, we think that the assumption is false that a contract of pledge as a security for the payment of money is analogous to a bilateral executory contract, in which the two parties mutually promise to do concurrent acts, and the promise of one is the consideration of the promise of the other. The modern authorities, therefore, require a tender of payment of the debt to enable the pledgor to maintain trover for a conversion of property pledged, unless the lien created by the pledge has been otherwise discharged. The distinction between a tender of payment of a debt due, and an offer to perform one of two mutual promises to do concurrent acts, is well known. *Cook v. Doggett*, 2 Allen, 439. The count does not allege a good tender

at common law. *Dunham v. Jackson*, 6 Wend. 22. *Bakeman v. Pooler*, 15 Wend. 637.

*Talty v. Freedmen's Savings & Trust Co.* 93 U. S. 321, was replevin of a certificate of indebtedness, brought by the pledgor against a purchaser from the pledgee, who bought *bona fide* and without notice or knowledge of the plaintiff's claim; and it was held that a previous tender was necessary, and that an offer to pay was not equivalent to a tender.

In *Lewis v. Mott*, 36 N. Y. 395, the action was brought by the assignee of the pledgor against the vendee of the pledgee. The court held that there "was no ground upon which the defendant could be held liable to an account, or upon which the plaintiff's right to redeem could be enforced against the defendant," but the Chief Justice proceeded to consider the action as if it were tort for illegal conversion. The pledgor had offered in writing to pay the defendant the debt for which the securities were pledged, and had demanded the securities, and the defendant had refused to comply with the demand. The Chief Justice says: "Clearly, on no theory was he [the pledgor] entitled to them [the securities], except upon payment of the amount of the lien, or a tender and refusal. Such tender has not been made. The offer to pay is not the equivalent for an actual tender."

*Donald v. Suckling*, L. R. 1 Q. B. 585, was detinue by the pledgor against a sub-pledgee of the pledgee, to whom the pledgee had delivered the debentures pledged, as security for a loan to him larger than the debt for which the debentures were originally pledged. Both debts remained unpaid; and it was held that the plaintiff could not maintain the action, because there had been no tender of the sum originally secured by the pledge.

*Halliday v. Holgate*, L. R. 3 Ex. 299, was trover by the assignee in bankruptcy of the pledgor against the pledgee for a wrongful sale of the property pledged. There had been no payment or tender of payment of the debt, and the court refused to sustain the action even for nominal damages, on the ground that, to maintain trover, the plaintiff must have the right of immediate possession, which he did not have until the debt was paid.

The Massachusetts cases declare that a tender is necessary to enable the pledgor to maintain trover against the pledgee for a conversion of securities, when the lien created by the pledge has not been otherwise discharged. *Jarvis v. Rogers*, 13 Mass. 105. *Jarvis v. Rogers*, 15 Mass. 389. *Hancock v. Franklin Ins. Co.* 114 Mass. 155. See *Hathaway v. Fall River National Bank*, 131 Mass. 14. Neither the English nor the Massachusetts cases, however, determine what amounts to a sufficient tender, although there are expressions which indicate that a tender good at common law is required.

When replevin or detinue is brought, there may be a substantial reason why there should be an actual tender, because the plaintiff, if he recover judgment, recovers or may recover the possession of the property, and the court might well order the money tendered paid into court before entering such a judgment. There is a technical reason why a formal tender may be held necessary in trover; because, if the lien created by the pledge has not been otherwise discharged, it may be held that it can be discharged only by the payment of the debt, or, if the defendant will not receive payment, by a tender of payment, which is the only thing the common law considers as in any respect an equivalent of payment; and trover can only be maintained when the lien has been discharged, and the plaintiff is entitled to the immediate possession of the property. But as the damages in trover are the value of the property less the amount of the debt, except for this technical reason, a want of a formal tender would not be a greater objection against maintaining trover than against maintaining an action for a breach of the contract to keep the property safely, and to deliver it to the pledgor on payment of the debt. Perhaps in contract, strictly speaking, no breach is shown by a failure to return the security unless the debt is paid or there has been a good common law tender of payment, but there are cases which hold that a formal tender is unnecessary. *Cortelyou v. Lansing*, *ubi supra*. *Fletcher v. Dickinson*, 7 Allen, 23. *Wilson v. Little*, 2 Comst. 443. The last was an action on the case for wrongfully selling stock, but whether trover or not is uncertain. In each of these cases, however, the property pledged had been wrongfully sold by the pledgee, which was in itself a

conversion and a breach of the contract. In *Fletcher v. Dickinson*, *ubi supra*, the action was contract; the defendant, by the sale and assignment of certain mortgages, held by him as collateral security, had received sufficient money to pay the plaintiff's debt to him; there had been, in fact, an offer in writing to pay the debt, and, although the plaintiff "did not tender or exhibit any money, his counsel was prepared to pay the notes, and so informed the defendant." The court held that the sale was illegal, and said, "A formal tender of the amount of the notes would have been a useless ceremony, such as the law never requires," citing *Cortelyou v. Lansing*, *ubi supra*.

The distinction between an unconditional offer to pay a debt, accompanied with a present ability and intention to pay, and a formal tender, is certainly technical, and the tendency of the law undoubtedly is to ignore technicalities which serve no useful purpose, and to administer the same substantive law in one form of action as in another, where different forms of action are permitted. Such an offer to pay would undoubtedly be sufficient to maintain a bill in equity to redeem the property pledged, and we do not deem it necessary to decide whether such an offer would not be sufficient to enable the pledgor to maintain either tort or contract against a pledgee who refused to accept the offer and return the property pledged, or whether any offer or tender at all is necessary to maintain tort or contract against a pledgee who has converted the property pledged by a wrongful sale of it, and applied the proceeds of the sale to the payment of the debt.

In the present case, no conversion of the stock is alleged, and, for that reason alone, the second count is not a good count in trover. A refusal of the defendant to receive payment of the debt is not alleged, nor any offer to pay the debt, except on condition that the stock be returned. It is doubtful if this count alleges that the plaintiff had the money to pay the note when he alleges that he offered to redeem the stock. The gist of the plaintiff's complaint, under this count, is that the plaintiff, by the neglect of the defendant to keep the stock safely until the maturity of the note, was prevented from redeeming the stock at the maturity of the note as he otherwise would have done, whereby the plaintiff lost the benefit of a sale of

the stock which he had made, and this implies that the lien created by the pledge continued until the debt was finally paid. If the defendant had, by the want of due care, suffered the property pledged, while in his possession, to be damaged, he undoubtedly would be liable to the plaintiff. But the property pledged was, on payment of the debt, restored to the plaintiff, uninjured and entire. The construction we put upon the second count is that the plaintiff, even if he had the right to do so, did not elect to treat as a conversion, or as a breach of contract, the defendant's refusal to restore the stock, when he offered at the maturity of the note to redeem it, but permitted the defendant to retain it as security for the debt while the debt remained unpaid. The plaintiff could have stood upon his rights, have paid or tendered payment of the debt at maturity, then demanded the stock, and, on the defendant's refusal to deliver it, have brought his action for the value. Whether trover could have been maintained for stock lost, need not be decided. See *Bowlin v. Nye*, 10 Cush. 416.

The plaintiff forbore to insist upon his rights. In consideration of this forbearance, the defendant made no promise to the plaintiff to pay him anything, and committed no tort and no breach of contract in retaining the stock until the plaintiff paid his note, and the property pledged was returned uninjured.

All the justices sitting concur in the result; and a majority of them concur in the reasons given in this opinion.

*Judgment affirmed.*

NEW HAVEN HORSE NAIL COMPANY vs. LINDEN SPRING  
COMPANY.

Suffolk. Jan. 27. — July 6, 1886. HOLMES & GARDNER, JJ., absent.

A bill in equity, brought by a corporation organized and doing business in Connecticut, against a corporation organized under the laws of that State, and its stockholders, alleged that the plaintiff was a creditor of the defendant corporation; that the defendant corporation had done business only in Massachusetts, and had no property which could be come at to be attached or taken on execution in an action at law; that the other defendants resided in Massachusetts; that in paying for their shares of stock, at the organization of the corporation, they paid partly in money, and partly in property at a valuation, which valuation was greatly in excess of the real value of the property, and this fact was known to them; and that under the laws of Connecticut, independently of any statutory or penal liability, a person subscribing for stock, or becoming a member of a corporation as an original shareholder, becomes liable to the corporation to pay for the shares the par value thereof, which liability is an asset of the corporation, forms a trust fund for the creditors, and may be enforced by any creditor of the corporation. The bill further alleged that the individual defendants were the organizers of the corporation, and its officers, and were guilty of a breach of trust in not requiring a full payment of the capital stock. The prayer of the bill was, that the value of the property paid in by the individual defendants be ascertained; and that they be ordered to pay to the corporation the amount of their respective deficiencies, so that the same could be paid to the plaintiff in satisfaction of his debt. *Held*, on demurrer, that the bill could not be maintained.

BILL IN EQUITY against a corporation established under the laws of the State of Connecticut, and having its usual place of business at Boston in this Commonwealth, and against David A. Andrews, Ambrose Eastman, and Hubbard W. Tilton, alleging the following facts:

The plaintiff, a corporation established under the laws of the State of Connecticut, and having its usual place of business in that State, is a creditor of the defendant corporation, its claim being evidenced by promissory notes. The defendant corporation was organized on or about June 23, 1879, with a capital stock fixed at \$25,000, divided into two hundred and fifty shares of the par value of \$100 each. The corporation became financially embarrassed in the summer of 1883, but continued to carry on business until February 1, 1884, when it became insolvent. It has no property which can be come at to be attached or taken on execution in an action at law. The defendants Andrews,



Eastman, and Tilton were the original subscribers to all the capital stock of the defendant corporation, and are the present holders of such stock, and the officers of the corporation.

Under the laws of the State of Connecticut, independently of any statutory or penal liability, a person subscribing for stock in a corporation, or becoming a member thereof as an original shareholder, becomes personally liable to the corporation to pay for said shares to the extent of the par value thereof, and this liability to the corporation to pay in to the same the face value of the stock is an asset of the corporation, and, as such, forms a trust fund for the benefit of creditors, which cannot be destroyed or extinguished by any arrangement between the company and its stockholders except by an actual paying into the company the par value of said stock, either in money or in property having the value of money.

The plaintiff is informed, and believes, that the stock subscribed for by said Tilton, Andrews, and Eastman was paid for by them by certain inventions and letters patent, by cash and machinery, tools, and other personal property; that said letters patent, so paid in as a part of the capital stock and in payment of said shares of stock, were of comparatively little value, the validity of said patent or patents being disputed, and said patent or patents being, for other reasons, of little value; that the value placed upon said letters patent, in reckoning the payment for said capital stock, was very greatly in excess of the real value of said letters patent; that the real value of said letters patent, at the time they were paid in as aforesaid in payment for said stock, did not exceed the sum of \$5000; that the valuation placed upon the machinery, tools, and other personal property paid in by said Tilton, Andrews, and Eastman, as aforesaid, in payment for said stock, was very greatly in excess of their real value; that the real value of said machinery, tools, and other personal property did not exceed at the time it was so paid in the sum of \$3500; that the amount of cash paid in, in payment for said capital stock, was a very small amount, and did not in all exceed the sum of \$1500; that the said defendants Tilton, Andrews, and Eastman well knew the real value of said letters patent and of said machinery and personal property, and that the value of the same, together with the cash paid in, was very much less than

the sum of \$25,000, and that the real value of said property and money did not exceed the sum of \$10,000.

Under the laws of Connecticut, the defendants Tilton, Andrews, and Eastman became liable, and still continue liable, to make a further payment for their shares of stock respectively. Said amount so due from them is altogether not less than the sum of \$15,000. Under the laws of Connecticut, according to the ordinary rules of equity, and independently of any statute, if a stockholder has not paid up the face value of his stock in full, either in money or in money's worth, he can, upon the insolvency of the corporation, be made personally and directly liable, at the instance of any creditor of the corporation, for the amount remaining unpaid or equitably due, with interest, if necessary, from the time of the original subscription for the stock.

The bill further alleged that Tilton, Andrews, and Eastman were the promoters and organizers of the defendant corporation, and, as such, owed a duty to said corporation, and were bound to see that the stock subscribed for was honestly and fully paid for by the persons taking it; that Tilton, Andrews, and Eastman failed to perform their duty as such promoters and officers of said Linden Spring Company, and that they were guilty of a breach of trust in not requiring a full and fair payment of the capital stock; that their allowing the property and money received from themselves to be reckoned above its fair value, and their treating it as full payment for the shares of stock subscribed for by them respectively, is not binding in equity upon creditors of said company, including the plaintiff, and does not take away the liability of said Tilton, Andrews, and Eastman to make such further payment as will suffice to pay this plaintiff what is due to it from the defendant corporation.

The bill further alleged that the defendant corporation has no property whatever in Connecticut, or anywhere outside of this Commonwealth; that all the stockholders and officers of said company are citizens of this Commonwealth; and that the plaintiff has duly demanded payment of the amount due to it, but the demand has been refused.

The prayer of the bill was that an account be taken, and the value ascertained and determined of the patent rights and other property paid in and transferred in payment for the capital stock

subscribed for by Tilton, Andrews, and Eastman, respectively, and that the amount of their respective deficiencies be determined, and a decree made, ordering them, and each of them, to pay the same, or so much thereof as might be necessary, so that the same could be applied in payment of the amount due the plaintiff; and that the amount due to the plaintiff from the defendant corporation be ascertained and determined by a decree of this court; and for further relief. The corporation, appearing by attorney, and the other defendants, demurred to the bill for want of equity.

The case was heard, on the bill and demurrer, by *W. Allen, J.*, and reserved for the consideration of the full court, such decree to be entered as justice might require.

*H. R. Bailey*, for the plaintiff.

*A. Eastman*, for the individual defendants.

DEVENS, J. The claim of the plaintiff, a foreign corporation, is upon certain promissory notes signed by the principal defendant, also a foreign corporation. This latter corporation has no property which can be reached so as to be attached, and the plaintiff seeks to establish, as against the individual defendants, that they are under such a liability to the principal defendant that they may be treated as its debtors, and ordered, as its equitable trustees, to pay their debt to the plaintiff, so far as that may be necessary, in order to discharge the plaintiff's claim against the defendant corporation. The plaintiff also contends that, by the facts set forth in its bill, it states a case which is good as a creditor's bill under the equity jurisdiction of the court.

The plaintiff does not set forth any contract made by the defendant stockholders, except that they subscribed for and took the capital stock of the corporation. Nor does it allege any promise made by them in relation thereto, or in regard to the liability which it says they incurred "independently of any statutory or penal liability." In the absence of any promise, definite in its character, on the part of the stockholders, there can be no liability to the corporation or the creditors of the corporation which does not proceed from the statute of Connecticut under which it is created.

The corporation is one formed under the general laws of that State, and the liabilities of stockholders, or of subscribers for the stock, are such as are prescribed by those laws. Their

subscription to the stock can have imposed upon them no other liabilities. The allegation of the plaintiff must therefore be interpreted as meaning that the alleged obligation of the subscribers is independent of any statutory or penal liability which is expressed in terms. When no promise is alleged, the only contractual obligation on the part of the subscribing stockholder must be that which arises from this relation. Whether it be expressed in terms, or derived from this relation under the laws of the State of Connecticut, as those laws may be interpreted by competent authority, it is not a common law obligation, but one created by the statute under which the corporation is formed. *Terry v. Little*, 101 U. S. 216.

The liability of stockholders in a Connecticut corporation must be determined by the law of that State. *Hutchins v. New England Coal Mining Co.* 4 Allen, 580. *Jones v. Sisson*, 6 Gray, 288. *Penobscot & Kennebec Railroad v. Bartlett*, 12 Gray, 244. *Blackstone Manuf. Co. v. Blackstone*, 13 Gray, 488. That the statutes of a State do not operate extra-territorially, *proprio vigore*, will be conceded. How far they should be enforced beyond the limits of the State which has enacted them must depend on several considerations; as whether any wrong or injury will be done to the citizens of the State in which they are sought to be enforced, whether the policy of its own laws will be contravened or impaired, and whether its courts are capable of doing complete justice to those liable to be affected by their decrees.

Where the rights sought to be passed upon and determined are those which arise from the relation between a corporation and its members, they depend upon the local law which exists at the place of its creation, and true policy would seem to require us to leave them to be there determined. The liability which the stockholders are alleged to be under to the corporation and its creditors has little analogy to a debt due according to the generally recognized principles of law. It is of a peculiar character, involving the organic law by which the corporation is created, and requiring local administration. We have heretofore, in similar cases, declined to pass upon and determine the relation existing between a foreign corporation and its members, and the obligation arising therefrom. *Halsey v. McLean*, 12 Allen, 488. *Smith v. Mutual Ins. Co.* 14 Allen, 336, 341. *Kansas & Eastern*

*Railroad Construction Co. v. Topeka, Salina, & Western Railroad*, 135 Mass. 34.

The reasons why we should not, in the case at bar, undertake to enforce the alleged obligations of the members of this corporation appear decisive. They are quite different from those which arise in Massachusetts from a contract to take and subscribe for shares. By our law, as settled by many decisions, in the absence of an express promise to pay for shares, none is created by a mere subscription therefor. Nor is any created by the mere agreement to take shares. No personal liability exists, as the corporation can by law assess such shares, and sell them for non-payment of assessments, which is held to be a sufficient remedy. *Andover & Medford Turnpike v. Gould*, 6 Mass. 40. *Andover & Medford Turnpike v. Hay*, 7 Mass. 102. *Franklin Glass Co. v. White*, 14 Mass. 286. *Ripley v. Sampson*, 10 Pick. 371. *Mechanics' Foundry Co. v. Hall*, 121 Mass. 272. *Katama Land Co. v. Jernegan*, 126 Mass. 155. While a different rule prevails in many States, the grounds upon which these decisions rest have also been approved in others. *Kennebec & Portland Railroad v. Kendall*, 31 Maine, 470. *New Hampshire Central Railroad v. Johnson*, 10 Foster, 390, 403. *Connecticut & Passumpsic Rivers Railroad v. Bailey*, 24 Vt. 465, 473. *Seymour v. Sturgess*, 26 N. Y. 134. It does not seem advisable that we should seek to enforce a liability thus differing from any which would have been incurred if the defendants had subscribed for shares of stock in a corporation formed in this State.

Again, the bill alleges that the defendants were bound to have made a full and honest payment for the shares, as subscribed for by them, to the extent of their par value; that they actually paid for the same by a transfer of property, knowingly reckoned by them at a price which exceeded by far its real value; that they are now liable to make further payment for their shares of stock; and that, by the laws of Connecticut, and according to the ordinary rules of equity, any stockholder who has not paid up his stock in full can, upon the insolvency of the corporation, be made personally and directly liable, at the instance of any creditor, for the amount remaining unpaid and equitably due. The individual defendants were the sole stockholders, and also the officers of the corporation, and the transaction by which they

paid for their stock was a transfer of a certain amount of cash, machinery, tools, and other property, together with certain inventions, and the letters patent therefor. It is alleged that, in reckoning the payment, an exaggerated value was knowingly placed upon all these descriptions of property. That, in the absence of fraud, an agreement may ordinarily be made by which stockholders can be allowed to pay for their shares in patents, mines, or other property, to which it is not easy to assign a determinate value, appears to be well settled. The bill does not aver any fraud actually committed, or intended to be committed, upon the public or the plaintiff, by these defendants, by obtaining from those with whom the corporation dealt a false credit. The liability alleged is one due to the corporation, growing out of the relation of these parties to it as stockholders. The extent of that liability, and the mode in which it shall be enforced, and the position in which the stockholders are placed, must be determined by the laws of Connecticut, and by a tribunal that can control the conduct and action of the corporation. The mere appearance by attorney of the defendant corporation does not enable this court so to do.

In a clause subsequent to that we have considered, the plaintiff avers that, as promoters and officers of the corporation, the defendants owed the duty to it to see that the stock subscribed for was fully and honestly paid in; that they failed to perform their duty, and were thus guilty of a breach of trust in not requiring the full and fair payment for the capital stock. No allegation is here made of any fraud committed upon the plaintiff as a creditor of the corporation. That which is set forth is a misfeasance on the part of the officers of the corporation, for which it may be that they are liable in damages to the corporation; but the plaintiff cannot, on this account, hold the defendants as debtors of the corporation who have failed to pay for their stock, which is the ground upon which, in either aspect, its bill proceeds. Nor, if these averments are sufficient to show that the transaction by which simulated payment was made constituted a fraud upon the corporation, would the defendants become the debtors of the corporation, and, as such, liable to pay as stockholders. As the corporation retains that which it has received, even if it were defrauded in the transaction, its remedy would,

according to the ordinary rule of law, be in damages for the wrong it had sustained from these stockholders. *Foreman v. Bigelow*, 4 Cliff. 508. The bill does indeed aver that, by the law of Connecticut, the defendants in such a case are liable as stockholders for a further payment upon their stock, so as to make it a full and honest payment. If such is the local law of Connecticut, and if such a liability may be treated as a debt, this law varies so much from that which ordinarily obtains in regard to similar liabilities, and also in the enforcement of contracts, that we are compelled to leave it to local administration.

*Bill dismissed.*

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WALLACE P. WILLETT & others vs. THOMAS A. RICH  
& others.

Suffolk. March 4. — July 6, 1886.

In an action of contract against a warehouseman, for a failure to keep safely goods entrusted to him, if it appears that the goods were returned in a damaged condition, and that the damage was caused by the fall of the warehouse, the burden of proof is on the plaintiff to show that such damage was caused by the negligence of the defendant or his servants.

MORTON, C. J. This is an action of contract against the defendants as warehousemen. The declaration contains four counts, but, as the third and fourth counts are the same as the first and second, except that they apply to a different lot of goods, we need consider only the first two counts.

The first count alleges that the defendants, as warehousemen, received goods of the plaintiffs, and agreed to keep the same safely, and to deliver the same to the plaintiffs upon demand, in the same order and condition as when received; that the goods were damaged while in the custody of the defendants; that they delivered them to the plaintiffs thus damaged and injured, and not in the same condition as when received, and thereby broke their contract.

The second count alleges that the defendants, as warehousemen, received goods of the plaintiffs, and agreed to store and

keep the same safely, and to deliver the same to the plaintiffs, upon demand; that they did not keep the same safely, but so negligently conducted themselves that, through the negligence of the defendants and of their servants, the goods were injured.

The case was, apparently, tried upon the second count. The injury to the plaintiffs' goods was caused by the fall of the warehouse; and the only ground upon which they claimed the right to recover was that the warehouse was not properly constructed, and that the defendants were negligent in not using reasonable care and diligence in examining and watching their warehouse and ascertaining its condition. After the evidence was all in, the defendants asked the court to instruct the jury that the burden of proof was on the plaintiffs to show that the injury and damage occurred through the neglect of the defendants, or those in their employ, to use ordinary care in regard to the building. The court refused this ruling, and instructed the jury that the burden of proof was on the defendants to show that such injury and damage occurred without their fault, or the fault of those in their employ; to which refusal and ruling the defendants duly excepted.

The fundamental rule as to the burden of proof is, that, whenever the existence of any fact is necessary in order that a party may make out his case or establish a defence, the burden is on such party to show the existence of such fact. In Stephen's Digest of the Law of Evidence, the rule is stated to be that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist." Steph. Ev. (Am. ed.) 175. The test of the question before us, then, must be the further question whether the existence of the fact of negligence on the part of the defendants is necessary to create a liability for a breach of their contract. This depends upon the character of the contract which, by implication of law, a warehouseman enters into when he receives goods for storage. It is clear that this contract is not such a one as is set out in the first count of the plaintiffs' declaration. He does not agree that he will keep them safely, and on demand deliver them in the same order and condition as when received by him. This would make him an insurer of the goods against



all damage by accident, deterioration, or any other cause. But the authorities clearly show that the implied undertaking of the warehouseman is not that he will, at all events, keep the goods safely, but that he will use reasonable and ordinary care and diligence in keeping them. *Thomas v. Boston & Providence Railroad*, 10 Met. 472. *Lamb v. Western Railroad*, 7 Allen, 98. *Cass v. Boston & Lowell Railroad*, 14 Allen, 448. *Gay v. Bates*, 99 Mass. 263. *Aldrich v. Boston & Worcester Railroad*, 100 Mass. 31. *Lane v. Boston & Albany Railroad*, 112 Mass. 455. *Roberts v. Gurney*, 120 Mass. 33. Unless he fails to use due care in keeping the goods, he has not broken his contract, but has done all that he agreed to do.

Suppose a plaintiff, in a case like the one before us, should prove that he had deposited goods with the defendant as a warehouseman, and that they were redelivered to the plaintiff in a damaged condition, and should admit that the defendant had used due care, and that the goods were damaged without any fault on his part, it could hardly be contended that the defendant was liable. In such a case, the existence of some negligence on the part of the defendant is an essential element of the plaintiff's case. He cannot ask the judgment of the court in his favor, unless such negligence exists, and we cannot logically escape from the conclusion that therefore the plaintiff must allege and prove this fact.

We are therefore of opinion, in the case at bar, that the jury should have been instructed that the burden of proof was on the plaintiffs, to show that the damage to their goods was caused by the negligence of the defendants or of their servants.

The ruling at the trial was made in deference to the decision in *Cass v. Boston & Lowell Railroad*, *ubi supra*; and the plaintiffs contend that that case covers, and is decisive of, the case at bar. That case might be distinguished from the case at bar. It was an action of contract against a warehouseman for the refusal to deliver, upon due demand, goods which had been entrusted to it for storage. The answer alleged that, without any negligence of the defendant, the goods were stolen from its warehouse. The decision and opinion of the majority of the court are carefully confined to the precise case before it. It recognizes fully the general principles which we have stated above, both as to

the nature of the warehouseman's contract and as to the burden of proof; and the utmost scope of the decision is, that, where there has been a refusal to deliver goods upon demand, and the warehouseman alleges that they have been stolen without his fault, the burden is upon him to prove this fact.

This does not reach the case at bar. The plaintiffs do not, and could not truly, allege that there has been a refusal to deliver upon demand. On the contrary, they are compelled by the facts to allege, as they do in the second count, that the goods were damaged while in the custody of the defendants by their negligence. Negligence is an issue raised by the pleadings, and is a fact which must exist in order to create any liability of the defendants. We see no reason to suppose, from the decision or the opinions in *Cass v. Boston & Lowell Railroad*, that, if the case before the court had been like the case at bar, the decision would have been different from ours. But we think the two cases really depend upon the same principles; and, upon careful consideration, we can see no principle upon which the decision in that case can be maintained. It seems to proceed upon one or both of two grounds: first, that, as the plaintiff did not allege negligence in his declaration, therefore negligence was not in issue; and secondly, that, as the plaintiff could make out a *prima facie* case by proof of a refusal to deliver upon demand, any excuse which the defendant set up for the refusal to deliver was matter in discharge and avoidance, which must be proved by the defendant. The opinion recognizes the question of negligence as one of the issues in the case, for the case proceeds upon the ground that, if the defendant could show that it was not negligent, it would be a complete answer to the plaintiff's case.

As the only contract of the warehouseman is that he will use due care in keeping the property, and deliver it on demand, if, after using due care, he shall have it in his possession, a plaintiff must show a breach of this contract to entitle him to recover, either in contract or tort. We do not see how, by changing the form of his declaration, he can change the liability or rights of the warehouseman. Whatever the form of declaration is, he is required to prove a breach of the contract. It may be that, where there is a refusal to deliver, the plaintiff may make out a *prima facie* case upon proving this fact, because such refusal,

if unexplained, is some evidence of the breach of the contract. But this does not shift the burden originally on the plaintiff to prove a breach of contract. The majority of the court say, in their opinion, "If the defendants indeed prove that the goods are stolen or lost, without direct fault on their part, so that performance is impossible, then, if the plaintiff charges that the loss occurred through negligence, he must prove it, and the burden of proof shifts upon him to do so." We understand the doctrine to be well settled in this Commonwealth, that the burden of proof never shifts; and we think that, in the case we are discussing, and in the case at bar, the burden to show negligence was upon the plaintiffs from the beginning, and remained upon them throughout the trial.

And it also seems clear to us that the fact set up by the defendant, in *Cass v. Boston & Lowell Railroad*, that the goods were stolen without its fault, was not matter in discharge or avoidance of the plaintiff's case. It did not admit a breach of contract, and set up new matter to excuse or avoid the effect of such breach. On the contrary, the evidence went to show that there had been no breach of the defendant's contract. It did not excuse and avoid, but denied the plaintiff's case.

We do not discuss these questions at great length, because to do so would only be to repeat the arguments of the exhaustive dissenting opinion of Chief Justice Bigelow in that case.

For the reasons stated, we are of opinion that the instructions requested by the defendants should have been given.

*Exceptions sustained.*

*R. Stone*, for the defendants.

*L. S. Dabney*, for the plaintiffs.

## JAMES G. MORRISON vs. SUSIE E. MORRISON.

Suffolk. March 5. — July 16, 1886.

Connivance by a husband at an act of adultery, committed by his wife with one person, on the ground of which a libel for divorce filed by him is dismissed, is not an absolute bar to a libel for divorce for a prior act of adultery, committed by her with another person, and not known to the husband at the time he brought the former libel.

LIBEL for divorce, on the ground of adultery, alleged to have been committed with one Pease on divers days between June 1, 1881, and March 1, 1882.

At the trial, before *Colburn, J.*, it was admitted that the parties to this cause were the same as those to the case reported in 136 Mass. 310, in which adultery of the libellee was charged, between February 21, 1882, and August 21, 1882, with one Dixon.

The libellant introduced evidence tending to prove adultery of the libellee with said Pease between June 1, 1881, and February 21, 1882; and that he did not know of the adultery charged in the present libel at the time he brought the former libel. The record and report of the former proceeding were introduced in evidence. The libellee contended that such record and report, and the facts involved therein, were a bar to this proceeding, and requested the judge so to rule. She also requested the judge to rule that, by such record, the libellant was estopped to deny his connivance at the adultery therein charged and found; that such connivance was a bar to this proceeding; and that the connivance of the libellant at one adultery barred him from a divorce for any other prior adultery.

The judge declined so to rule, and ruled that the libellant was estopped by the record and report of the former suit to deny his connivance at the adultery therein charged, but that the record and report were not a bar to maintaining the present libel, if the libellant proved that the adultery charged in the present suit was committed prior to the adultery charged in the former suit, and was not known to him at the time he brought the former libel.

The judge found for the libellant, and ordered a decree of divorce in his favor for the adultery charged; and the libellee alleged exceptions.

*H. W. Bragg*, for the libellee.

*S. Lincoln & J. R. Smith*, for the libellant.

GARDNER, J. The question raised in this case is, whether the connivance of the husband at one act of adultery is a bar to a divorce for a prior act with another *particeps criminis*. The libellant contends, that, the adultery of the libellee with Pease having been found, the only thing which can bar the libellant is condonation of that adultery, connivance at that adultery, or the commission by the libellant of some offence which is in itself ground for a divorce. Neither condonation of the adultery with Pease, nor connivance at it, is set up in defence.

The statutes enumerate various causes which will entitle an aggrieved party to an absolute divorce from the bond of matrimony. Pub. Sts. c. 146, § 1. It is well settled that a suitor for divorce cannot prevail, if open to a valid charge, by way of recrimination, of any of the causes of divorce set out in the statute. *Cumming v. Cumming*, 135 Mass. 386, 389. Recrimination as a bar to divorce is not limited to a charge of the same nature as that alleged in the libel. *Handy v. Handy*, 124 Mass. 394. It is sufficient if the recrimination charges any one of the causes of divorce, of equal grade, so declared in the statute.

The general principle which governs in a case where one party recriminates is, that recrimination must allege a cause which the law declares sufficient for a divorce. *Lyster v. Lyster*, 111 Mass. 327. *Cumming v. Cumming*, *ubi supra*. *Clapp v. Clapp*, 97 Mass. 531. *Hall v. Hall*, 4 Allen, 39.

*Lyster v. Lyster* was a libel for divorce on the ground of desertion. The libellee justified in leaving the libellant because of his cruel and abusive treatment, and his gross and confirmed habits of intoxication. The court held that ill-treatment or misconduct by the husband, of such a degree or under such circumstances as not to amount to cruelty for which the wife would be entitled to sue for a divorce, might justify her in leaving his home, and prevent his obtaining a divorce for her desertion if she did so. This decision is in accordance with the great weight of American authority. It is not a case of recrimination. The

libellee justifies her act in leaving her husband by reason of his ill-treatment. The general rule, that recrimination must allege a cause which the law declares to be sufficient for a divorce, is not affected by it.

Our divorce statutes make no provision respecting connivance, collusion, condonation, or recrimination, and this court has assumed that the Legislature "intended to adopt the general principles which had governed the ecclesiastical courts of England in granting divorces from bed and board, so far as these principles are applicable, and are found to be reasonable." *Robbins v. Robbins*, 140 Mass. 528. This assumption does not go so far as to embrace the recent statute law of England in relation to divorce.

Under the English divorce act, 20 & 21 Vict. c. 85, a divorce will not be granted, if the court find that, during the marriage, the petitioner has been accessory to, or conniving at, the adultery of the other party to the marriage, or has condoned the adultery complained of. It has been repeatedly held, under this statute, that connivance on the part of the husband will, in point of law, bar him from obtaining relief, on account of the adultery which he has allowed to take place. *Volenti non fit injuria* is the principle upon which the rule has been founded. *Rogers v. Rogers*, 3 Hagg. Eccl. 57. *Phillips v. Phillips*, 1 Rob. Eccl. 144, 161. Under this principle, it is not always necessary to show active connivance. If it is proved that there has been a long course of criminal conduct on the part of the wife, of which the husband was cognizant, or of which, by law and presumption, he must be supposed to have been cognizant, he cannot secure relief. *Crewe v. Crewe*, 3 Hagg. Eccl. 123. The conduct of the husband after being informed of the adultery of his wife, his refusal to interfere with her, or to institute proceedings against her for a divorce, or his long delay in so doing, may not in themselves be connivance, but may be evidence of it. A total indifference to such adultery may lead to the inference of original consent. If there was consent, there was no injury, and the husband cannot ask for relief where he has not been injured.

It has also been held that a husband who connives at an act of adultery by his wife cannot complain of any subsequent act, whether with the same or with another *particeps criminis*. *Gipps*

v. *Gipps*, 3 Sw. & Tr. 116. *Stone v. Stone*, 3 Notes of Cases, 278, 282. It has been held that the same principle extends to any act of adultery subsequent to the one directly connived at, because the husband, having consented to the fall of his wife from virtue, cannot complain of acts naturally resulting from such fall. It has been doubted whether the general doctrine that connivance at one adultery is a bar to any subsequent adultery, either with the same or with another *particeps criminis*, should govern all cases. The doctrine may be carried too far, and thus deprive a man of all hope, however repentant he may be, and however he may strive to win his wife to repentance. 2 Bish. Mar. & Div. § 10.

In *Hodges v. Hodges*, 3 Hagg. Eccl. 118, it was held that a husband, proceeding against his wife for her gross adultery committed after a separation of five years from him, resulting in the birth of children baptized in his name, was not barred, although, before the separation, he had connived at her adultery with men other than the one with whom this was committed. This case has been doubted and overruled. *Stone v. Stone*, *ubi supra*. *Rogers v. Rogers*, *ubi supra*. See also *Hedden v. Hedden*, 6 C. E. Green, 61.

The libellee relies upon the language used by Lord Stowell in *Lovering v. Lovering*, 3 Hagg. Eccl. 85. In that case, an apprentice was continued in the house, with the husband's permission, after he knew of great and indecent familiarities between the apprentice and his wife, and until she was guilty of adultery with another. The court found that the facts amounted almost to consent, and showed a degree of delinquency which rendered him unworthy of a remedy; that the husband had connived at another adulterous act nearly contemporaneously committed with another person. The wife made no defence. "The ecclesiastical court," said Lord Stowell, "requires two things, that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife; and if he has relaxed with one man he has no right to complain of another."

The language of the court was applicable to the facts of the case, and cannot be referred to a state of facts not existing. It could not refer to a prior act of adultery. The facts of the case did not authorize such reference. Whatever misconduct the court found must have been such as conduced to the subsequent

or contemporaneous adultery. When his lordship said, "If he has relaxed with one man, he cannot complain of another," he said in substance, "If he has relaxed with the apprentice, he cannot complain of the man who contemporaneously committed adultery with his wife." This case is no authority for the doctrine contended for by the libellee.

We have been referred to no case where the court has held that connivance was a bar to a divorce for a prior adultery. The English statutes and decisions seem to require that the adultery complained of must in some way be the result of, or connected with, the connivance charged, or the divorce will not be barred. As where a wife sets up in defence her husband's connivance at an adultery with a different person, prior to the adultery charged, she must prove the prior adultery. *Stone v. Stone*, *ubi supra*. *Harris v. Harris*, 2 Hagg. Eccl. 376, 416. The iniquity which deprives a suitor of a right of justice in a court of equity is not general iniquitous conduct, unconnected with the matter in suit, but evil practice or wrongful conduct in the particular matter or transaction in respect to which judicial protection or redress is sought. *Woodward v. Woodward*, 14 Stew. Eq. 224.

We find no authority for laying down the rule, that, under all circumstances, connivance at one adultery is an absolute bar to a divorce for a prior adultery, and we feel disinclined to say that it is not reason for refusing a divorce under some circumstances. The character of the connivance under some circumstances may be so open, gross, and revolting, that the court may find that no injury has been done the husband, and that therefore there is nothing to redress, that the husband has entirely abandoned all right to claim that his wife should be chaste, and that he has thus consented to her prior adultery. He may come before the court with such impure hands, that, upon the soundest considerations of public policy, his divorce should be refused. On the other hand, the circumstances of the connivance may be of such a character, having no connection or relation with the prior adultery, as not to operate as a bar, or otherwise, against the right of the husband to find relief.

In the case at bar, the presiding justice ruled that the record of the former suit was not a bar to maintaining the present libel,



if the libellant proved that the adultery charged in the present suit was committed prior to the adultery charged in the former suit, and was not known to him at the time he brought the former libel. Upon inspection of the record of the former suit, and examination of the evidence reported, we do not find the connivance found by the court in that case to be of such a character as to bar the libellant from a divorce for the adultery charged in the libel at bar.

*Exceptions overruled.*

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EDWARD B. JAMES *vs.* CITY OF NEWTON & another.

Middlesex. Jan. 25. — Sept. 7, 1886. HOLMES & GARDNER, JJ., absent.

An assignment for value, without the consent of the debtor, of a part of a debt due under an existing contract between the debtor and the assignor, may be enforced by a bill in equity by the assignee against the debtor and the assignee in insolvency of the assignor, although the debtor is a municipal corporation, if the debtor in its answer admits that the debt is due, and asks that the rights of the different claimants of the fund be determined by the court.

A., who was erecting a building under a contract in writing with B., became insolvent, and a majority of his creditors voted to accept his offer to pay a certain sum on the dollar in full settlement of their claims. C., with full knowledge of these facts, lent him a sum of money to enable him to complete his contract with B. and to fulfil his agreement of compromise with his creditors, and took from him an assignment, under seal, of an equivalent sum due under the contract. A. expended most of the money received from C. for the purpose for which it was borrowed. By reason of the refusal of certain creditors to accept the amount offered, A. filed a petition in insolvency, five days after the assignment was executed, and an assignee of his estate was appointed. *Held*, that the assignment by A. to C. was not made in fraud of the insolvent law.

BILL IN EQUITY, filed June 24, 1885, against the city of Newton and Royal Gilkey, assignee in insolvency of the estate of William H. Stewart, alleging the following facts :

William H. Stewart, on August 14, 1883, entered into a contract in writing with the city of Newton to build a school-house for said city upon the terms and conditions set forth in said contract.\*

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\* By the terms of the contract, a copy of which was annexed to the bill, Stewart agreed to build the school-house, according to certain plans and specifications, the building to be completed on or before May 1, 1884, for

Stewart thereupon entered upon the performance of his part of said contract, and had nearly fulfilled the same, when, he becoming financially embarrassed, on June 13, 1884, a meeting of his creditors was held, and they voted to accept his offer of twenty cents on the dollar in full settlement of their respective claims.

On June 21, 1884, for the purpose of enabling him to carry out his contract with the city, and to fulfil his agreement with his creditors, Stewart applied to the plaintiff for a loan of money, whereupon the plaintiff, in good faith and for the purpose aforesaid, lent him the sum of \$575, and took the following instrument, executed by Stewart: "Know all men by these presents, that I, William H. Stewart, of Newton, in the Commonwealth of Massachusetts, in consideration of six hundred dollars to be paid by Edward B. James of Cambridge in said Commonwealth, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer, and make over to the said James the sum of six hundred dollars now due and to become due and payable to me from the city of Newton in said Commonwealth, under and by virtue of a contract between the said city and myself for building a grammar school-house, dated August 14, 1883. It is agreed that said sum of six hundred dollars shall be paid out of the money reserved as a guaranty by said city, and at the time the same would become payable to me according to the terms of said contract, and that I shall finish the said building and perform my part of said contract according to its terms. To have and to hold the same to the said Edward B. James, with power to collect the same in my name and as my attorney, hereunto duly authorized, to his own use." The plaintiff immediately notified the city of said assignment.

On June 26, 1884, Stewart, by reason of the refusal of certain creditors to accept said twenty cents on the dollar, filed a petition in insolvency, and on July 10, 1884, Royal Gilkey was duly elected assignee of his estate. Before and after the filing of said petition, Stewart expended the greater portion of said \$575

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the sum of \$23,975, seventy-five per cent of which was to be paid from time to time as the work progressed, and the balance after the expiration of thirty-three days from the fulfilment of the contract. It was further provided, that "neither party hereto is to sell, assign, transfer, or sublet this contract, except by the written agreement of the other party."

in the further completion of his contract with the city, and made a proper and legitimate use of all of said sum. At the time of filing said petition, there was due Stewart under said contract the sum of \$600 or more, though not then payable.

After Gilkey was appointed assignee, he substantially completed the contract with the city, whereby under said contract there became due the sum of \$3238, most of which sum has been paid to Gilkey as assignee, the city reserving, on account of this assignment, a sum sufficient to pay the same.

The city has been ready and willing to make a severance of the sum due under said contract, to pay the plaintiff the amount of said assignment and Gilkey the balance, if it can legally do so, but has been forbidden so to do by Gilkey, who, as assignee, claims the whole amount due under said contract, and has begun an action at law therefor, which is now pending in this court.

The prayer of the bill was, that the suit at law pending between Gilkey, as such assignee, and the city of Newton, might be stayed to await the determination of this suit in equity; that the city be enjoined from paying the sum of \$600 to Gilkey until the further order of this court; and that said sum be decreed to be paid to the plaintiff by the city.

The answer of the city of Newton admitted having paid to Gilkey \$2462.25, and that it had in its hands a balance of \$776.43, and proceeded as follows:

"This defendant admits that said Gilkey has commenced a suit at law in this court for said balance, which suit is now pending, and says that said plaintiff hath claimed the amount named in said assignment and by virtue thereof, and this defendant is now and always has been ready and willing to pay said balance to such person or persons as should be justly entitled to receive the same, whether said plaintiff or said Gilkey as such assignee, and to whom this defendant could safely pay the same, but this defendant cannot pay over said sum without taking upon itself the responsibility of determining doubtful questions of law and fact, and says that it is liable and likely to be subject to great cost and expense in defending itself from said parties, each of whom claims said sum.

"This defendant prays that said suit at law may be stayed and enjoined, and that said plaintiff and said Gilkey may interplead,

and settle and adjust their demands between themselves, and that the court shall order and decree to whom said sum shall be paid, and that it may be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained."

The answer of Gilkey, so far as it need be stated, contained the following averments:

"This defendant further says, that, at the time of the filing of said petition in insolvency, said contract was not nearly completed, and that this defendant, principally out of his own money and credit, and partly out of the assets of said estate, advanced large sums to finish said contract, and did finish the same at an expense of more than \$1000, and also paid off many mechanics' liens to which said building was subject by reason of the failure of said Stewart to pay his workmen, and that, if this defendant had not so completed said contract and paid said liens, nothing would have been due to him or any one from said city. Said liens amounted to more than \$500.

"This defendant says that the assets of said Stewart's estate, including said fund in controversy, are insufficient to pay the preferred claims for labor already proved.

"This defendant submits that said assignment, under the circumstances under which it was given, was in fraud of the insolvent laws, and so void."

The following facts were agreed upon:

The plaintiff and Stewart, at the time of execution of the assignment, knew that Stewart was actually insolvent, and had called a meeting of his creditors, and that they had voted to accept twenty cents on the dollar of their claims, (that is, a majority of those present at the meeting had so voted, a small portion never acceding to the arrangement,) and Stewart represented to the plaintiff that he was obtaining this money to assist him to complete the contract and to effect the composition of twenty cents on a dollar, and assured him that he could do so.

No action or vote was ever had or taken upon said assignment by the city, by the city council or either branch thereof, by any committee, or by any person authorized to bind the city.

The assignee, Gilkey, when he was appointed, had substantially no funds of the estate of Stewart in his possession, and,

in order to complete said contract, expended about \$1200 of his own funds in labor and materials in finishing the building, and paid off, out of the funds in the hands of the city eventually paid him, mechanics' liens thereon amounting to about \$500 besides. It is admitted that said sum expended by him was a reasonable one, and necessary to finish the contract.

The plaintiff actually paid and lent to Stewart the sum of \$575 at the time of the execution of said assignment, which was the sum agreed upon between the two, and Stewart expended the same as follows: \$225 to his counsel as a retainer in insolvency and for professional services; \$210 on the school-house contract, \$68 of which he expended after filing his petition; \$77 for personal expenses after he went into insolvency; and the balance in personal expenses before filing his petition in insolvency, which was a voluntary one. After filing the petition, the creditors who had refused to accept the composition were seen and urged to accept, but again refused. No note or memorandum was given to the plaintiff by Stewart for said loan of \$575. Stewart made no claim against the estate for an allowance for support of himself and family, consisting of four persons, but made use of said \$77 for that purpose.

Hearing in the Superior Court, on the bill, answers, and agreed facts, before *Knowlton, J.*, who reserved the case for the determination of this court.

*C. C. Powers*, for the plaintiff.

*W. S. Slocum*, for the city of Newton.

*W. B. Durant*, for Gilkey.

FIELD, J. The assignment in this case is a formal assignment, for value, of "the sum of six hundred dollars now due and to become due and payable to me" from the city of Newton, under and by virtue of a contract for building a grammar school-house, and it is agreed that this sum "shall be paid out of the money reserved as a guaranty by said city," and the assignee is empowered "to collect the same." There is no doubt that it would operate as an assignment to the extent of \$600, if there can be an assignment, without the consent of the debtor, of a part of a debt to become due under an existing contract; and the cases that hold that an order drawn on a general or a particular fund is not an assignment *pro tanto*, unless it is accepted by the

person on whom it is drawn, need not be noticed. That a court of law could not recognize and enforce such an assignment, except against the assignor if the money came into his hands, is conceded. The assignee could not sue at law in the name of the assignor, because he is not an assignee of the whole of the debt. He could not sue at law in his own name, because the city of Newton has not promised him that it will pay him \$600. The \$600 is expressly made payable "out of the money reserved as a guaranty by said city;" and, by the contract, the balance reserved was payable as one entire sum; and at law a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to an assignee of the creditor, unless he promises to do so. Courts of law originally refused to recognize any assignments of choses in action made without the assent of the debtor, but for a long time they have recognized and enforced assignments of the whole of a debt, by permitting the assignee to sue in the name of the assignor, under an implied power, which they hold to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. It is not wholly a question of procedure, although the common law procedure is not adapted to determining the rights of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor cannot sue his debtor for a part of an entire debt, and, if he brings such an action and recovers judgment, the judgment is a bar to an action to recover the remaining part. There must be distinct promises in order to maintain more than one action. *Warren v. Comings*, 6 Cush. 103.

It is said that, in equity, there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that, as between assignor and assignee, there may be such an assignment. The law that, if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee as the consideration of the debtor's promise to pay the assignee,

and that by this promise the indebtedness to the assignor is *pro tanto* discharged. It has been held, by courts of equity which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debtor, although he has not expressly promised to pay the assignees, yet asks that the fund be distributed or the debt paid to the different defendants according to their rights as between themselves; and the rule against partial assignments was established for the benefit of the debtor. *Public Schools v. Heath*, 2 McCarter, 22. *Fourth National Bank v. Noonan*, 14 Mo. App. 243.

In many jurisdictions, courts of equity have gone farther, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and assignor while the debt remains unpaid. The procedure in equity is adapted to determining and enforcing all the rights of the parties, and the debtor can pay the fund or debt into court, have his costs if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts of equity have gone still farther, and have held that, after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and, if he does, that this is no defence to a bill by the assignee. The doctrine carried to this extent effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule, he cannot, if he have notice or knowledge of an assignment of any part of it.

It may be argued that, if a bill in equity can be maintained against the debtor by an assignee of a part of the debt, it must be on the ground, not only that the plaintiff has a right of property in the sum assigned, but also that it is the debtor's duty to pay the sum assigned to the assignee; and that, if this is so, it follows that, after notice of the assignment, the debtor cannot rightfully pay the sum assigned to the assignor.

The facts of this case, however, do not require us to decide whether a bill can be maintained after the debtor has paid the entire debt to his creditor, although after notice of a partial assignment. The city of Newton, in its answer, says that it "is willing to pay said balance to such person or persons as should be justly entitled to receive the same, whether said plaintiff, or said Gilkey as such assignee;" and prays "that said plaintiff and said Gilkey may interplead, and settle and adjust their demands between themselves, and that the court shall order and decree to whom said sum shall be paid." This is in effect asking the aid of the court in much the same manner as if the city of Newton had brought a bill of interpleader; and the proceedings are not open to the objection that the court is compelling the city of Newton to assent to an assignment against its will.

This is the first bill in equity to enforce a partial assignment of a debt which has been before this court. It has been often declared here, that there cannot be an assignment of a part of an entire debt without the assent of the debtor; but the cases are all actions at law, and in the majority of them the statement was not necessary to the decision.

In *Tripp v. Brownell*, 12 Cush. 376, 381, the action was assumpsit, to recover the amount of the plaintiff's lay as a mariner on a whaling voyage. The defence was an assignment of the balance due, made by the plaintiff and accepted by the defendant. This was held a good defence, the court saying: "It is in terms an assignment of the whole lay; it must be so by operation of law. It is not competent for a creditor to assign part of the debt, so as to give any equitable interest in part of the debt, or create any lien upon it. The debtor, or holder of the assignable interest, cannot, without his own consent, be held legally or equitably liable to an assignee for part, and to the original creditor, or another assignee for another part. *Mandeville v. Welch*, 5 Wheat. 277. *Gibson v. Cooke*, 20 Pick. 15. *Robbins v. Bacon*, 3 Greenl. 346."

*Gibson v. Cooke*, *ubi supra*, was assumpsit, brought in the name of Gorham Gibson for the benefit of one Plympton, to whom Gibson had given an order on the defendant to pay Plympton \$175.33 "as my income becomes due." The defendant



held property in trust to pay over the "net proceeds once a quarter" to Gibson and others. The court held, that it did not appear that; "at the time of the assignment, or at any period since, the whole amount due to Gorham Gibson would correspond with the amount of the draft," and that "a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract was one and entire."

*Knowlton v. Cooley*, 102 Mass. 233, was a trustee process, and the trustee had in his hands \$147 due the defendant as wages, and the claimant held an order, given by the defendant before the wages were earned, for the payment to him of the defendant's wages, "as fast as they became due, to the amount of \$150," which the trustee had accepted. The court held that the order was an assignment of wages, and, not having been recorded, was invalid against a trustee process by the St. of 1865, c. 43, § 2. The court say: "The acceptance of the order by Barton [the trustee] does not change its character. His assent was necessary to give it any validity even as an assignment. *Gibson v. Cooke*, 20 Pick. 15."

*Papineau v. Naumkeag Steam Cotton Co.* 126 Mass. 372, was an action of contract, and the court say: "The order of Couillard on the defendant, in favor of the plaintiff, was not an order for payment of all that should be due the drawer as wages at the several times when the instalments were to be paid. It was not, therefore, an assignment of wages to the plaintiff, unless the defendant saw fit to assent to it as such, but a mere order for money."

It is settled that an assignment of a part of a debt, if assented to by the debtor in such a manner as to imply a promise to pay it to the assignee, is good against a trustee process, or against an assignee in insolvency. *Taylor v. Lynch*, 5 Gray, 49. *Lannan v. Smith*, 7 Gray, 150. In *Bourne v. Cabot*, 3 Met. 305, the court say, "The order of Litchfield on the defendant was a good assignment of the fund, *pro tanto*, to the plaintiff, and the express promise to the assignee, to pay him the balance when the vessel should be sold, constituted a legal contract."

It is also settled, that an equitable assignment of the whole fund in the hands of the trustee is good against a trustee process,

although the trustee has received no notice of the assignment until after the trustee process is served, and has never assented to it. *Wakefield v. Martin*, 3 Mass. 558. *Kingman v. Perkins*, 105 Mass. 111. *Norton v. Piscataqua Ins. Co.* 111 Mass. 532. *Taft v. Bowker*, 182 Mass. 277. *Williams v. Ingersoll*, 89 N. Y. 508.

Before, as well as since, the St. of 1865, c. 43, § 1, (Pub. Sts. c. 183, § 38,) if the assignment was for collateral security, and the assignee was bound to pay immediately to the assignor, out of the sum assigned, any balance remaining after payment of his debt, it has been held that the excess above the debt for which the assignment is security is attachable by the trustee process. *Macomber v. Doane*, 2 Allen, 541. *Darling v. Andrews*, 9 Allen, 106. *Warren v. Sullivan*, 123 Mass. 283. *Giles v. Ash*, 123 Mass. 353. See *Lannan v. Smith*, *ubi supra*.

In *Macomber v. Doane*, *ubi supra*, the court say: "An order constitutes a good form of assignment, it being for the whole sum due or becoming due to the drawer, and it needs not be accepted to make it an assignment." The order was for one month's wages, which, as subsequently ascertained, amounted to \$37.50, but it was given as security for groceries furnished and to be furnished, and, on the day of the service of the writ, the defendant owed the claimant for groceries \$28.79, and the remaining \$8.71 was held by the trustee process.

Some of these cases were noticed in *Whitney v. Eliot National Bank*, 137 Mass. 351, and the court then declined to decide "whether in equity there may not be an assignment of a part of a debt."

Without considering the cases upon the effect of orders or drafts for money, as constituting assignments of the debt or of a part of it, it seems never to have been decided in this Commonwealth that an assignment for value of a part of an entire debt is not good, to the extent of the assignment, against trustee process. In trustee process, the trustee of the defendant, if charged, is by the statute compelled to pay to the plaintiff so much of what he admits to be due to the defendant as is necessary to satisfy the plaintiff's judgment; and, as an entire debt may thus be divided, it seems equitable that an assignee of a part of the debt should be admitted as a claimant,

and this is in effect done when the assignment is as collateral security.

*Palmer v. Merrill*, 6 Cush. 282, was assumpsit against the administrator of Spaulding, who had caused his life to be insured, by a policy payable to himself, his executors, administrators, or assigns; and he, by a memorandum in writing indorsed on the policy, for a valuable consideration, assigned and requested the insurer to pay the plaintiff the sum of \$400, part of the sum insured by the policy, in case of loss on the same, of which assignment and request the insurers on the same day had due notice. The policy, with this indorsement thereon, remained in the custody of Spaulding until his decease, and came into the hands of the administrator of his estate, who collected the whole amount of the insurance, and represented the estate as insolvent; and the question was "whether the case shows an assignment, which vested any interest in this policy, legal or equitable, in the plaintiff."

The court held that it did not, and said: "According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit. But, in order to constitute such an assignment, two things must concur: first, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation, in which the chose in action consists. . . . It appears to us, that the order indorsed on this policy, and retained by the assured, fails of amounting to an assignment, in both of these particulars." The court further said, that, if an order be "for a part only of the fund or debt, it is a draft or bill of exchange, which does not bind the drawee, or transfer any proprietary or equitable interest in the fund, until accepted by the drawee. It therefore creates no lien upon the fund. Upon this point, the authorities seem decisive. *Welch v. Mandeville*,

1 Wheat. 233; *S. C.* 5 Ib. 277. *Robbins v. Bacon*, 3 Greenl. 346. *Gibson v. Cooke*, 20 Pick. 15."

*Welch v. Mandeville*, *ubi supra*, was an action of covenant broken, brought by Prior in the name of Welch against Mandeville, who set up a release by Welch, to which Prior replied that Welch, before the release, had assigned the debt due by reason of the covenant to him, of which the defendant had notice. The court consider the effect of certain bills of exchange, and say: "But where the order is drawn either on a general, or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft;" that "a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor;" and that, "if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit."

The equitable doctrine now maintained by the Supreme Court of the United States is shown by *Wright v. Ellison*, 1 Wall. 16; *Christmas v. Russell*, 14 Wall. 69; *Trist v. Child*, 21 Wall. 441; and *Peugh v. Porter*, 112 U. S. 737. In *Peugh v. Porter*, that court ordered that a decree be entered that Peugh, subject to certain rights in the estate of Winder, was entitled to one fourth of a fund, by virtue of an assignment of one fourth of a claim against Mexico, made before the establishment of the claim from which the fund was derived, and before the fund was in existence; and declared the law to be, that "it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." In *Robbins v. Bacon*, *ubi supra*, the order was for the payment of the whole of a particular fund, and was held good.

The existing law of Maine is declared in *National Exchange Bank v. McLoon*, 73 Maine, 498, by an elaborate opinion, and the conclusion reached is, that an assignment of a part of a chose in action is good in equity, and against a trustee process.

In England, it is held that the particular fund or debt out of which the payment is to be made must be specified in the assignment; *Percival v. Dunn*, 29 Ch. D. 128; but the assignment of

a part of a debt or fund is good in equity. The present case is like *Ex parte Moss*, 14 Q. B. D. 310, and a stronger case for the plaintiff than *Brice v. Bannister*, 3 Q. B. D. 569, where, although the procedure was under the St. of 36 & 37 Vict. c. 66, the foundation of the liability was that the assignment was good in equity; and the case at bar is relieved from the difficulties which induced Brett, L. J., in that case, to dissent; and *Brice v. Bannister* was approved in *Ex parte Hall*, 10 Ch. D. 615. The present case also resembles *Tooth v. Hallett*, L. R. 4 Ch. 242, except that there the sums paid by the trustee for creditors in finishing the house exhausted all that became due under the contract. See also *Addison v. Cox*, L. R. 8 Ch. 76.

In *Appeals of Philadelphia*, 86 Penn. St. 179, it is conceded that the rule that an assignment of a part of a debt is valid prevails in equity between individuals; but the court refused to apply it to a debt due from a municipal corporation, on the ground that "the policy of the law is against permitting individuals, by their private contracts, to embarrass the principal officers of a municipality." See *Geist's appeal*, 104 Penn. St. 351. But there is no ground for any such distinction in this Commonwealth.

In New York, the assignment of a part of a debt or fund is good in equity. *Field v. Mayor*, 2 Seld. 179. *Risley v. Phenix Bank*, 83 N. Y. 318. And the same doctrine is maintained in other States. *Daniels v. Meinhard*, 53 Ga. 359. *Etheridge v. Vernoy*, 74 N. C. 809. *Lapping v. Duffy*, 47 Ind. 51. *Fordyce v. Nelson*, 91 Ind. 447. *Bower v. Hadden Blue Stone Co.* 3 Stew. (N. J.) 171. *Gardner v. Smith*, 5 Heisk. 256. *Grain v. Aldrich*, 38 Cal. 514. *Des Moines v. Hinkley*, 62 Iowa, 637. *Canty v. Latterner*, 31 Minn. 239. *First National Bank v. Kimberlands*, 16 W. Va. 555.

From the examination of our cases, it appears not to have been decided that there cannot be an assignment of a part of a fund or debt which will constitute an equitable lien or charge upon it, and be enforced in equity against the debtor or person holding the fund. *Palmer v. Merrill*, *ubi supra*, may well rest upon the first reason given for the decision. See *Stearns v. Quincy Ins. Co.* 124 Mass. 61-63. The decisions of courts of equity in other jurisdictions are almost unanimous in maintaining such a lien,

where the assignment is for value, distinctly appropriates a part of the fund or debt, and makes the sum assigned specifically payable out of it.

Without undertaking to decide what is not before us, and confining ourselves to the facts in the case, which are that the debt is admitted and remains unpaid, and the debtor in his answer asks the court to determine the rights of the different claimants, we think that there should be a decree that the city of Newton pay to the plaintiff \$600; and that the remainder of the sum due from the city, after deducting its costs, be paid to Gilkey, assignee.

The assignment was not made in fraud of the laws relating to insolvency.

*So ordered.*

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### CITIZENS' NATIONAL BANK vs. JONATHAN OLDHAM.

Suffolk. March 12.—Sept. 7, 1886. W. ALLEN & HOLMES, JJ., absent.

In an action of replevin by a mortgagee against an officer, who attached the property on a writ against the mortgagor, the issue was whether the mortgaged property had been delivered to and retained by the mortgagee before the attachment. The judge, who tried the case without a jury, ordered that judgment for a return of the replevied property be entered for the defendant, and allowed a bill of exceptions, which stated that the mortgagor was a sub-contractor under B., and used the replevied property in his business; that after a breach of the conditions of the mortgage, and before the attachment, C., as the agent of B., and as the agent of the plaintiff to take possession of the property for the breach of said conditions, with the assent of the mortgagor assumed control of the business, the mortgagor remaining to assist him, and the property continued to be used as before, but under C.'s control. The exceptions further stated that the judge found that, when the property was attached, the mortgagor was in actual possession and use of the property subject to the control of C. *Held*, that, in the absence of a finding that the property was "delivered to and retained by" the mortgagee, as required by the Gen. Sts. c. 151, § 1, the court could not say, as matter of law, that the judgment was erroneous.

REPLEVIN of six United States mail wagons. Writ dated October 27, 1881. After the former decision, reported 136 Mass. 515, the defendant, on March 5, 1884, remitted all but nominal damages, and thereupon, on March 10, 1884, moved, in the Superior Court, for judgment for a return of the replevied property.

Hearing upon this motion, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The defendant is a deputy sheriff, and seized and held the wagons as the property of Hiram Littlefield, by attachment under a writ dated October 10, 1881, against Littlefield. The plaintiff claims under a mortgage, made to it by Littlefield on June 29, 1881, which was recorded on June 30, 1881, at Boston, the place of business of the mortgagor, and was not recorded at Salisbury, Massachusetts, the place of his residence.

Littlefield was a sub-contractor under one Boone, to carry on the United States mail service in Boston. Boone was the contractor with the United States government for that service. The replevied property consisted of six of the mail wagons of the style necessarily used in that service by the contract; and it was essential, in order to avoid a breach of the contract, to keep these wagons in constant use in the mail service, and they were so used.

A breach of the conditions of the plaintiff's mortgage had existed since about September 1, 1881. On September 23, 1881, one Castleman, the duly authorized agent of Boone, came to Boston to take from Littlefield the possession, control, and management of the mail service on account of Littlefield's failure to perform it properly under the sub-contract; and also, as the duly authorized agent of the plaintiff, to take possession of the wagons, for breach of the conditions of its said mortgage. On October 1, 1881, Castleman, acting under his authority from the plaintiff and Boone, and by express understanding and consent of Littlefield, assumed the management and control of the mail service under said contract, and continued it until after the attachment, Littlefield remaining, by request of Castleman, to assist him; and these wagons continued to be used as before in said service, but under Castleman's control.

Immediately after the attachment, the plaintiff had no counsel in Boston except R. Lund, Esq., counsel of Littlefield and Boone. Lund testified that he thought he drew up, within a day or two after the attachment, a form of notice of such mortgage, with a power of attorney, as was required by the statute, and delivered the same to Boone, but he could not remember what became of it; and the defendant testified respecting such notice and

demand, as set out in 136 Mass. 515. It was also in evidence, and not disputed, that the firm of Jewell and Shepard, consisting of Harvey Jewell, Esq., and E. O. Shepard, Esq., was first employed by the plaintiff on October 27, 1881, and that Mr. Jewell alone acted for it at first, and was informed that, between October 10 and that date, the mortgagee's notice and demand, as required by the statute, had been given to the defendant; that Mr. Jewell died in December, 1881, and thereafter Mr. Shepard acted in this case for the plaintiff; that he had no information or knowledge that the requisite statutory statement and demand of the plaintiff as mortgagee had not been made to the defendant, and rested under that belief until November, 1882, when, in the course of preparing the case for trial, he for the first time learned that it was doubtful if such statement and demand as the statute requires had been previously given to the defendant; and thereupon he at once procured the plaintiff to give to the defendant the statement in writing, and make the demand upon him as set forth in the finding of the judge in these exceptions. It is not contended that the statement and demand were not made within a reasonable time after such discovery by Mr. Shepard, in November, 1882. The officers of the plaintiff bank were in Washington; were ignorant of the statute laws of Massachusetts respecting such statement and demand; and relied wholly upon their counsel in Boston.

The judge found as follows: Hiram Littlefield was, when said mortgage was made, not a resident of Boston, but of Salisbury. On October 10, 1881, when the defendant attached the replevied property, said Littlefield was in the actual possession and use of the replevied property, subject to the direction and control therein of an agent of the plaintiff, authorized thereto by the plaintiff, for the cause that said Littlefield, in the month of September, 1881, had committed a breach of the condition of said mortgage. On November 16, 1882, the plaintiff gave to the defendant a statement in writing of a just and true account of the debt and demand due to the plaintiff under said mortgage, and at the same time demanded payment of said debt and demand; but said statement was not given to, or payment of the debt demanded of, the defendant within a reasonable time after said attachment. The judge ordered that judgment for a return of



the replevied property be entered for the defendant. The plaintiff alleged exceptions.

*E. O. Shepard*, for the plaintiff.

*S. J. Thomas*, for the defendant.

GARDNER, J. The plaintiff concedes that the mortgage given by Littlefield was not recorded as required by the Gen. Sts. c. 151, § 1, which, among other things, provide that "unless a mortgage is so recorded, or the property mortgaged is delivered to and retained by the mortgagee, it shall not be valid against any person other than the parties thereto." In order to show that there was an existing mortgage which would prevail against the defendant, the plaintiff must prove that the property mortgaged was "delivered to and retained by the" plaintiff. The property was within the exclusive possession and control of Littlefield, the mortgagor, until October 1, 1881. At that time, Castleman came to Boston, as the authorized agent of the mortgagee, to take possession of the wagons for breach of the condition of the plaintiff's mortgage; and on October 1, 1881, with the consent of Littlefield, and acting under his authority from the plaintiff, he "assumed the management and control of the mail service under said contract, and continued it until after the attachment." Littlefield remained to assist him, the wagons continued to be used as before in said service, but under Castleman's control. The agent of the plaintiff was also agent of one Boone, who was the contractor with the United States government to carry on the United States mail service in Boston. Littlefield was sub-contractor under Boone, and failed to perform his contract, and Castleman, as the agent of Boone, came to Boston to take from Littlefield the possession, control, and management of the mail service. It was essential, in order to avoid a breach of the contract, to keep these wagons in constant use in the mail service, and they were so used.

The presiding judge found at the trial that Littlefield, at the time of the attachment, was in the actual possession and use of the property, subject to the direction and control therein of an agent of the plaintiff, authorized thereto by the plaintiff.

This case differs from that of *Carpenter v. Snelling*, 97 Mass. 452, in one important particular, although in other respects it is similar. In that case, the agent of the mortgagee went to the

house of the mortgagor with a bill of parcels, and the mortgagor pointed out the property enumerated therein, and said that he gave possession of it to the agent in behalf of the mortgagee. In the case at bar, there is no evidence of such a delivery. The evidence is not clear as to what Castleman, the agent, did. He may have done no more than execute direction and control over the mail service, and incidentally over the wagons used in the service, without any delivery of possession to him. The Superior Court may have found that there was no such delivery to, and retention of the mortgaged property by, the agent Castleman as the statute required. This was a question of fact clearly within the determination of that court, and is not subject to our revision. The bill of exceptions does not undertake to report all the evidence, and we cannot say, as matter of law, that the court did not find that there was no delivery of the mortgaged property to the mortgagee's agent, and retention by him of the same. If the court so found, we cannot determine that there was error in such finding.

*Exceptions overruled.*



**FRANCIS L. CHAPIN & another vs. MARY D. FREELAND.**

Worcester. October 3, 1884; October 22, 1885. — September 8, 1886.

When the statute of limitations would be a bar to a direct proceeding by the original owner of personal property, it cannot be defeated by indirection within the jurisdiction where it is law. A title which will not sustain a declaration will not sustain a plea. **FIELD, J.**, dissenting.

Two counters, which belonged to A., were, without his knowledge or authority, placed by B. in a shop built by him on his land, nailed to the floor, and used there. Four years afterwards, B. mortgaged the premises to C., who, eight years later, foreclosed the mortgage, and then sold the premises to D., making no mention of the counters. A., who two years subsequently first learned where the counters were, took them from D.'s possession. *Held*, that D. could maintain replevin against A. for the counters. **FIELD, J.**, dissenting.

**REPLEVIN** of two counters. Writ dated November 14, 1881. Trial in the Superior Court, without a jury, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows:

There was evidence tending to show, and the judge found, that, in 1867, one Daniel Warner built a building upon his land in Oxford, and fitted up the same with shelving and counters, and designed the same for use as a store for the sale of general merchandise; that the counters in controversy were put into the store by him, and were arranged for convenient use therein; that the same were nailed to the floor, and were used in said building; that on January 2, 1871, Warner mortgaged the premises to Alexander DeWitt; that DeWitt died in 1879, and Charles A. Angell and William Newton were appointed executors of his will; that in April, 1879, said executors foreclosed said mortgage by sale, under the power contained therein, and became the purchasers of the premises; that, soon after such sale, Warner removed the counters from the building, and the executors regained possession of them, and put them back upon the premises, but did not nail or fasten them to the premises; that afterwards the executors sold the premises to the plaintiffs, but did not make mention of the counters in their deed, nor speak of them in the sale; and that the defendant took the counters from the premises occupied by the plaintiffs in 1881.

The defendant offered evidence tending to show, and the judge found, that she purchased these counters, with two others, in 1861; that they were built in Worcester and sent to her complete at Oxford, and placed in her store; that they were heavy counters with black-walnut tops and heavy bases, with panelled front, supported by standards standing upon the floor, and were not fastened to the floor, but were kept in position by their own weight, and were used there until some time in 1866, when, the store being then occupied by a tenant, they were set on one side as not being adapted to the business for which such store was then used, and finally, with the knowledge and consent of DeWitt, were moved out of the building on to the street, and placed one upon the other; that Warner took the counters from their place in the street, and put them in his store, as aforesaid; that there were two mortgages on the defendant's store premises given some time previously to November 26, 1866, which were assigned to DeWitt on that day; that from that date, by agreement with the defendant, DeWitt, who was the defendant's

brother, had charge of said estate and of said counters for the defendant; that she never authorized him, or any other person, to dispose of the counters, and never herself parted with her property in them; that, soon after the counters were removed from her store, she missed them, and made inquiries for them, but failed to find them; and that, when she learned that they were upon the plaintiffs' premises, she took them away.

There was no other evidence than as above stated as to the means of the defendant of obtaining information as to where the counters were after they were taken from her store, or as to any concealment of the taking of the counters by Warner. It was in evidence, however, that the defendant, after 1861, resided some of the time in Oxford and some of the time in Sutton.

There was no evidence, except as before stated, tending to show what interest, if any, Warner claimed to have in the counters at the time they came into his possession, or at any time thereafter; and there was no other material evidence in the case applying to the rulings made or asked for at the trial.

The plaintiffs asked the judge to rule as follows: "1. Upon the evidence, the counters, though attached to the store by one who had no title to them, became fixtures and a part of the realty, and passed to the mortgagee, and to the purchasers at the foreclosure sale, and came rightfully into the possession of the plaintiffs when they purchased the premises, as belonging thereto, though not then nailed to the building. 2. The defendant had lost the right to take the counters, if Warner had no right or title to them when he so took and attached them to the store building, such taking being a tort, and, as a cause of action, barred by the statute of limitations long before the defendant removed them in 1881, and therefore having no right to recover them, and nothing appearing sufficient to take the case out of the statute. 3. Upon the evidence and facts, as before stated, the plaintiffs, as matter of law, were entitled to maintain their action, and the facts in the case would not warrant a finding for the defendant."

The judge declined to rule as requested; and found for the defendant. The plaintiffs alleged exceptions.

*A. J. Bartholomew*, for the plaintiffs.

*J. Hopkins*, for the defendant.

HOLMES, J. This is an action of replevin for two counters. There was evidence that they belonged to the defendant in 1867, when one Warner built a shop, put the counters in, nailed them to the floor, and afterwards, on January 2, 1871, mortgaged the premises to one DeWitt. In April, 1879, DeWitt's executors foreclosed, and sold the premises to the plaintiffs. The defendant took the counters from the plaintiffs' possession in 1881. The court found for the defendant. Considering the bill of exceptions as a whole, we do not understand this general finding to have gone on the ground either of a special finding that the counters remained chattels for all purposes, and were not covered by the mortgage, *Carpenter v. Walker*, 140 Mass. 416, or that there was a fraudulent concealment of the cause of action, within the Gen. Sts. c. 155, § 12 (Pub. Sts. c. 197, § 14). But we understand the court to have ruled or assumed that, although the statute should have run in favor of Warner or DeWitt before the transfer to the plaintiffs, that circumstance would not prevent the defendant from taking possession if she could, or entitle the plaintiffs to sue her for doing so, if she was the original owner.

A majority of the court are of opinion that this is not the law, and that there must be a new trial. We do not forget all that has been said and decided as to the statute of limitations going only to the remedy, especially in cases of contract. We do not even find it necessary to express an opinion as to what would be the effect of a statute like ours, if a chattel, after having been held adversely for six years, were taken into another jurisdiction by the originally wrongful possessor, although all the decisions and dicta, so far as we know, agree that the title would be deemed to have passed. *Cockfield v. Hudson*, 1 Brev. 311. *Howell v. Hair*, 15 Ala. 194. *Jones v. Jones*, 18 Ala. 248, 253. *Clark v. Slaughter*, 34 Miss. 65. *Winburn v. Cochran*, 9 Tex. 123. *Preston v. Briggs*, 16 Vt. 124, 130. *Baker v. Chase*, 55 N. H. 61, 63. *Campbell v. Holt*, 115 U. S. 620, 623. What we do decide is, that, where the statute would be a bar to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. If he cannot replevy, he cannot take with his own hand. A title which will not sustain a declaration will not sustain a plea.

It is true that the statute, in terms, only limits the bringing of an action. But whatever importance may be attached to that ancient form of words, the principle we lay down seems to us a necessary consequence of the enactment. And a similar doctrine has been applied to the statute of frauds. *Carrington v. Roots*, 2 M. & W. 248. See *King v. Welcome*, 5 Gray, 41.

As we understand the statutory period to have run before the plaintiffs acquired the counters, we do not deem it necessary to consider what would be the law if the plaintiffs had purchased or taken the counters, within six years of the original conversion, from the person who first converted them, and the defendant had taken them after the action against the first taker had been barred, but within six years of the plaintiffs' acquiring them. We regard a purchaser from one against whom the remedy is already barred as entitled to stand in as good a position as his vendor. Whether a second wrongful taker would stand differently, because not privy in title, we need not discuss. See *Leonard v. Leonard*, 7 Allen, 277; *Sawyer v. Kendall*, 10 Cush. 241; *Norcross v. James*, 140 Mass. 188, 189; Co. Lit. 114 b, 121 b.

*Exceptions sustained.*

FIELD, J. I am unable to assent to the opinion of the court. As the case was tried without a jury, and the court found generally for the defendant, the only questions of law are those raised by the plaintiffs' requests for rulings, which were refused. The plaintiffs must prevail, if at all, upon their own title or right of possession. There was evidence that the defendant purchased the counters in 1861, and placed them in her store, where they were used until some time in 1866, when, with the knowledge and consent of DeWitt, the defendant's brother, they were moved out of the building to the street; that DeWitt, from November 26, 1866, held a mortgage upon the defendant's "store premises," and "from that date, by agreement with the defendant, had charge of said estate and of said counters;" that, in 1867, Daniel Warner took the counters, without the defendant's knowledge or authority, and put them into his store, and nailed them to the floor, and mortgaged his premises to DeWitt on January 2, 1871; that DeWitt died in 1879, and this mortgage was foreclosed by a sale made by the executors of

DeWitt's estate to themselves in April, 1879, and they afterwards "sold the premises to the plaintiffs," not mentioning the counters in their deed; that the defendant, "soon after the counters were removed from her store, missed them, and made inquiries for them, but failed to find them; and that, when she learned that they were upon the plaintiffs' premises, she took them away," in 1881, and retained possession until the plaintiffs replevied them. "There was no evidence, except as before stated [in the exceptions], tending to show what interest, if any, Warner claimed to have in the counters at the time they came into his possession, or at any time thereafter." From the time Warner took the counters until he mortgaged his premises to DeWitt, six years had not expired; but, if it be assumed that Warner remained in possession until the mortgage given by him was foreclosed by a sale, he held possession more than six years. The possession of the plaintiffs could not have been for a longer time than about two years. If DeWitt was in possession from the date of the mortgage to him until his death, this was more than six years; but there was evidence that he was the agent of the defendant to take charge of the counters. The terms of the mortgage and conveyance under which the plaintiffs claim are not set out, but it has been assumed that they conveyed whatever title, if any, Warner had in the counters. It is manifest that, as between landlord and tenant, these counters would have been either furniture or trade fixtures, and that, if they were taken by Warner and affixed to his store tortiously, without the consent of the defendant, she could have retaken them. *Kimball v. Grand Lodge of Masons*, 131 Mass. 59. *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 447. *Guthrie v. Jones*, 108 Mass. 191.

The rule that the title of personal property is lost by a wrongful conversion of it into some other species of property, or by making it a part of real estate, has its foundation in the impossibility or impracticability of tracing the property, or of severing it from the real estate; and when personal chattels are, without the consent of the owner, and without right, taken by another and affixed to real property, the title of the owner is not lost, unless the identity of the chattels has been destroyed, or they have been so affixed to the real property that it is impracticable

to sever them. See *Wetherbee v. Green*, 22 Mich. 311; *Jewett v. Dringer*, 3 Stew. (N. J.) 291. I think that the first request, therefore, ought not to have been given.

As the plaintiffs first took possession of the counters as their own some time after the foreclosure of the mortgage in 1879, the statute of limitations would have been no defence to them if the defendant had brought trover against them in 1881, when she took possession of the counters; their only defence would have been title in themselves derived from their vendors, and this title rests ultimately upon the possession of Warner. The second request, as applicable to the case, is in effect that, if Warner took the counters tortiously, and kept them attached to his building more than six years, the defendant lost her right of property in the counters. It is not stated in the request, that Warner's possession, to effect a change of title, must have been either known to the defendant or open and notorious, and must have been under a claim of right; and that his possession was of this character is not necessarily to be inferred from the evidence. The effect of the statute of limitations of real actions upon the acquisition of title to real property is carefully discussed in *Langdell on Eq. Pl.* §§ 119 *§ seq.* Our statute of limitations of real actions provides that "no person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or to make such entry first accrued, or within twenty years after he, or those from, by, or under whom he claims, have been seised or possessed of the premises, except as is hereinafter provided." Pub. Sts. c. 196, § 1. Gen. Sts. c. 154, § 1. Rev. Sts. c. 119, § 1. Sts. 1786, c. 13; 1807, c. 75. Commissioners' Notes to the Rev. Sts. c. 119. As writs of right and of formedon, and all writs of entry except those provided by the Pub. Sts. c. 134, were abolished by the Rev. Sts. c. 101, § 51, it follows that, with certain exceptions not necessary to be noticed, after a disseisin continued for twenty years, or in other words after twenty years from the time when the right to bring a writ of entry or to enter upon the land first accrued, the former owner of a freehold can neither maintain any action to recover possession, nor enter upon the land, nor, without an entry, convey it; and as all remedy, either by action or by taking possession, is gone, his title is



held to have been lost. The effect of the statute has been to extinguish the right, as well as to bar the remedy, and this is the construction given to the English St. of 3 & 4 Wm. IV. c. 27. Our statute of limitations of personal actions was taken from the St. of 21 Jac. I. c. 16, and this statute has been held not to extinguish the right, but only to bar the remedy. *Owen v. De Beauvoir*, 16 M. & W. 547; 5 Exch. 166. *Dawkins v. Penrhyn*, 6 Ch. D. 318; 4 App. Cas. 51. *Dundee Harbour v. Dougall*, 1 Macq. 317, 321. *In re Alison*, 11 Ch. D. 284.

Section 1 of the Pub. Sts. c. 197, declares: "The following actions shall be commenced within six years next after the cause of action accrues, and not afterwards . . . actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels." There is no statute, and no law, prohibiting the owner of personal chattels from peaceably taking possession of them whenever he may find them, and the technical law of seisin and disseisin was never applied to personal chattels. It is established in this Commonwealth that a debt barred by the statute of limitations of the place of the contract is not extinguished. The statute only bars the remedy by action within the jurisdiction where the defendant has resided during the statutory period. *Bulger v. Roche*, 11 Pick. 36. It was formerly contended that, if the parties to a contract had resided within the same jurisdiction so long a time that, under the statute of limitations there, the remedy by action was barred, this ought to be held everywhere to have extinguished the right of action, and thus to have extinguished the debt, especially if the residence was that of the place where the contract was made; and the courts of some jurisdictions so held. *Brown v. Parker*, 28 Wis. 21, 30. *Goodman v. Munks*, 8 Port. 84, which is overruled in *Jones v. Jones*, 18 Ala. 248. See *LeRoy v. Crowninshield*, 2 Mason, 151, 168. This view was, however, generally abandoned, and was never the law of this Commonwealth, of the English courts, of the Supreme Court of the United States, or of the courts of most of the States. A distinction was made in some of the Southern States between debts and chattels; and, in suits for the recovery of slaves, it was held that adverse possession for the statutory period of limitations of personal actions created a title. In some of the decisions, it is said that the possession must be *bona fide*,

and acquired without force or fraud, and must be peaceable and adverse. It was held, however, that, where there had been successive purchases of a slave, the possession of the successive purchasers could not be tacked, so as to create a title by adverse possession, because each purchase, if the purchaser took possession, was a new conversion; but such a title acquired by one person could be transferred to another. In some of these States, at the time of these decisions, it was also held that the statute of limitations of personal actions extinguished debts. *Cockfield v. Hudson*, 1 Brev. 311. *Howell v. Hair*, 15 Ala. 194. *Clark v. Slaughter*, 34 Miss. 65. *Winburn v. Cochran*, 9 Tex. 123. *Wells v. Ragland*, 1 Swan, 501. *Bryan v. Weems*, 29 Ala. 423. *Seay v. Bacon*, 4 Sneed, 99. *Bernard v. Chiles*, 7 Dana, 18. *Moffatt v. Buchanan*, 11 Humph. 369. *Newby v. Blakey*, 3 Hen. & M. 57. *Beadle v. Hunter*, 3 Strob. 331. See *Goodman v. Munks*, *ubi supra*.

In *Preston v. Briggs*, 16 Vt. 124, and *Baker v. Chase*, 55 N. H. 61, it was suggested that adverse possession of a chattel for six years transferred the title; but the cases did not require a determination of the question. In *Campbell v. Holt*, 115 U. S. 620, 623, there is an express declaration that "the weight of authority is in favor of the proposition that where one has had the peaceable, undisturbed, and open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title, a title superior to the latter, whose neglect to avail himself of his legal rights has lost him his title." The cases there cited are two of the slave cases which have been mentioned, and decisions of the Supreme Court of the United States relating to real property.

The law of the Supreme Court of the United States in regard to contracts was carefully stated in *Townsend v. Jemison*, 9 How. 407; and it was there held that, when the statute extinguished the right or title, and created a new one, this new right or title would be recognized by courts in other jurisdictions; but, if the statute only affected the remedy, the courts would afford the remedies provided by their own laws. Our decisions upon the effect of our statute of limitations upon debts or contracts uniformly hold that it affects only the remedy by action. *Bulger*

v. *Roche*, *ubi supra*. *Thayer v. Mann*, 19 Pick. 535. *Hancock v. Franklin Ins. Co.* 114 Mass. 155.

There is nothing in the statute which suggests any distinction between actions to recover chattels and actions to recover debts, and it does not purport to be a statute relating to the acquisition of title to property, but a statute prescribing the time within which certain actions shall be brought. There is not a trace to be found in our reports of the doctrine that possession of chattels for the statutory period of limitations for personal actions creates a title, and I can find no such doctrine in the English reports, or in the reports of a majority of the courts of the States of this country. The law concerning the acquisition of easements in real property by prescription, in its modern form, was established by the courts by adopting in part the Roman law, and by limiting the period of enjoyment necessary to create the right to the time required by statute for bringing actions for the recovery of land. *Edson v. Munsell*, 10 Allen, 557.

A right of way may be acquired by repeated trespasses, if they are openly made under a claim of right, and are uninterrupted; but twenty years' user is required, although the limitation for actions of tort in the nature of trespass *quare clausum* is six years. It was inevitable, perhaps, that, if a title to land could be acquired by adverse possession, a privilege or easement in land should be acquired by adverse use. By the Pub. Sts. c. 197, § 14, if a person liable to an action "fraudulently conceals the cause of such action from the knowledge of the person entitled to bring the same, the action may be commenced at any time within six years after the person so entitled discovers that he has such cause of action." This section has been construed strictly. *Nudd v. Hamblin*, 8 Allen, 130. Under this section, if one man stole another man's watch and carried it on his person as watches are usually carried, it might be held that the thief fraudulently concealed the cause of action from the owner; but if the thief sold the watch to one who purchased it in good faith, and he carried it in his pocket, this could not be held to be a fraudulent concealment; and, if the statute of limitations transfers the title, the owner, at the end of six years, would lose the title to his watch, although he may not have known or been able to discover who had it. The possession of personal chattels, even

although honestly held, is not always open and notorious, and if title to such chattels is to be acquired by possession, it ought to be by an adverse possession *bona fide* held under a claim of right, which was known to the owner, or so open and notorious that the owner ought to have known it. The second request does not assume, and it has not been found as a fact, that such was the nature of Warner's possession.

*Lamb v. Clark*, 5 Pick. 193, was assumpsit by an executor to recover money paid to the defendant by the makers of certain promissory notes which had been delivered, more than six years before the action was brought, to the defendant as his property, by the plaintiff's testator, as the consideration of a conveyance of land by the defendant to the testator's wife. The plaintiff contended that there was a fraudulent combination between the defendant and the wife of the testator, whereby the testator had been defrauded of his property. It was conceded by the court, that an action of trover might have been brought at any time within six years after the defendant received the notes, and that such an action was barred by the statute of limitations. The plaintiff, however, was permitted to recover all sums of money received by the defendant from the makers of the notes within six years before the commencement of the action. If the expiration of the six years had transferred the title of the notes to the defendant, it is difficult to see how the action could have been maintained.

*Wilkinson v. Verity*, L. R. 6 C. P. 206, was detinue by the church wardens of All Saints against the vicar, who, in 1859, having the custody of the communion plate, sold it for old silver. The church wardens discovered this in 1870, and then made a demand. The defence was the statute of limitations, and that the conversion occurred when the defendant sold the plate. The court say: "If this had been an action for damages for the conversion of the plate, in which the demand and refusal would have been only evidence of a conversion, it would have been impossible to contend that the date of the conversion could be excluded, or to deny that the defence upon the statute was sustained. Nor could the ignorance of the plaintiffs or their predecessors have prevented its operation." But the court held that the plaintiffs could elect to sue the defendant in detinue upon his

contract as bailee to deliver the plate on demand, and that "it is no answer for the bailee to say that he has incapacitated himself from complying with the lawful demand of the bailor."

These cases show that the statute of limitations of personal actions is construed with reference to the particular action brought, and indicate that there is no change of title in property, although the time for bringing an action of trover has expired. I think that the subject of the acquisition of title to personal chattels by adverse possession can best be dealt with by the Legislature, if it is thought necessary to establish such a rule of law; and that it was not the intention of our statute of limitations of personal actions to extinguish rights or titles.

There is much force in the suggestion, that, if the defendant could not have recovered the counters by action at the time she took possession, she ought not to be permitted to take them from the possession of the plaintiffs by force or fraud; but it is not found in the case that she took them by force or fraud, and the request does not assume this; and I think that the defendant, at the time she took possession, could have recovered these counters of the plaintiffs by action, as the statute of limitations did not begin to run in favor of the plaintiffs until they took possession, which was at least as late as 1879; and it is not found that the plaintiffs' vendors had any title which they could convey to the plaintiffs. I think the second and third requests ought not to have been given.

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#### DANIEL BRICKETT *vs.* HAVERHILL AQUEDUCT COMPANY.

Essex. November 6, 1885. — September 8, 1886.

The St. of 1867, c. 73, authorizing an aqueduct corporation to take and use the waters of certain ponds to supply the inhabitants of a town with water by an aqueduct, and to enter upon and take any lands necessary for laying and maintaining aqueduct pipes or other works necessary for that purpose, and providing that "all damages sustained by entering upon and taking land, water, or water rights, for either or any of the above purposes, shall, in case of disagreement with the parties injured, be ascertained, determined, and recovered in the same manner as is now provided in cases where land is taken for highways," makes, in connection with the general laws, adequate provision for compensation, and is constitutional.

The St. of 1867, c. 73, in § 1, authorized an aqueduct company to take and use the waters of two ponds named, and of a certain lake. In § 5, it was provided that nothing in the act should be construed to authorize the company "to raise the water of any of said ponds above high-water mark, nor to drain any of them below low-water mark." *Held*, that the restriction applied to the lake as well as to the ponds.

If a statute authorizes an aqueduct corporation to take and use the waters of certain ponds to supply the inhabitants of a town with water, and to enter upon and take any lands necessary for maintaining its works for this purpose, and provides that damages sustained thereby may be recovered in the manner provided where land is taken for highways, and that nothing in the act shall authorize the corporation to raise the water of any of said ponds above high-water mark, nor to drain any of them below low-water mark, and the corporation, in proceeding under the statute, violates this last provision, and causes damage to a landowner, the latter may maintain an action of tort against the corporation therefor; and it is immaterial that the land so injured is situated in another State.

TORT for diverting and obstructing a watercourse, and thereby preventing water from flowing through the plaintiff's land. Trial in the Superior Court, before *Staples, J.*, who ruled that the plaintiff could not maintain his action; ordered a verdict for the defendant; and, at the request of the parties, reported the case for the determination of this court. If the ruling was erroneous, the verdict was to be set aside and a new trial granted; otherwise, the verdict was to stand. The facts appear in the opinion.

*I. A. Abbott*, for the plaintiff.

*B. B. Jones*, for the defendant.

MORTON, C. J. It does not appear by this record when the defendant was incorporated. It has been in existence many years, and we presume it was organized under the St. of 1798, c. 59.

In 1867, the legislature recognized it as an existing corporation, and conferred upon it the power "to take and use the waters of Round Pond and Plug Pond, so called, and Kenoza Lake in the town of Haverhill, to supply the inhabitants of said town with water by an aqueduct, and to enter upon, take, and dig up any and all lands necessary for laying and maintaining aqueduct pipes, reservoirs, gates, dams, or other works, necessary for that purpose." St. 1867, c. 73.

Section 2 provides that "all damages sustained by entering upon and taking land, water, or water rights for either or any of the above purposes, shall, in case of disagreement with the

parties injured, be ascertained, determined, and recovered in the same manner as is now provided in cases where land is taken for highways."

Acting under this statute, the defendant took the waters of Kenoza Lake, which is a great pond situated in Haverhill, and, for the purpose of retaining the waters, built a dam across a small natural stream, not navigable, called Fishing River, which was the only outlet of the pond. The plaintiff owns land situated partly in Massachusetts and partly in New Hampshire, through which this stream flows. He contends that the effect of taking the water and building the dam is to diminish the flow of water through his land, and has brought this common law action of tort for this diversion of the water of the stream.

Without doubt, the defendant was liable to the plaintiff in some form of proceeding for any damage sustained by him by reason of taking the water and building the dam. *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267. But it is settled that, when the Legislature authorizes a municipal or other corporation to take private property for public uses, and provides in the statute a mode of ascertaining and recovering the damages, such statutory remedy is the only remedy to which the injured party can resort for acts done within the authority of the statute.

It follows that the plaintiff cannot maintain an action of tort for injuries caused to him by any acts of the defendant which it was authorized to do under the statute, but his only remedy is the one pointed out by the statute.

The plaintiff recognizes this principle; but contends that the St. of 1867 is unconstitutional and invalid, because it does not make adequate provision for the recovery of damages caused by the defendant's acts under it.

The Constitution provides that, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Declaration of Rights, art. 10. Undoubtedly, a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void. *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50,

and cases cited. But the St. of 1867 does not undertake to do this. It provides, in substance, that the corporation shall be liable to pay all damages for injury to private property, and specifies a sufficient remedy to enable the person injured to recover such damages. We are not aware of any case in which it has been held that such provisions are not a sufficient compliance with the requirement of the Constitution. The instances are numerous in which aqueduct companies have been incorporated by statutes which contain the same provisions for securing compensation. The successive Legislatures, in these statutes, recognized the constitutional obligation to make adequate compensation, and deemed that such provisions did, with practical certainty, secure the rights of individuals whose property was taken or injured.

They undoubtedly took into consideration, not only the special remedy provided by each statute, but the other rights and remedies which an individual would have under the general laws, if his damages were not paid after they were ascertained. Take the case before us. If the plaintiff, or any person injured, had, upon proper application, had his damages ascertained, he would be entitled to a warrant of distress to compel the payment of them; Pub. Sts. c. 110, § 18; if this was ineffectual, and the defendant still refused to pay, without doubt this court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam.

The question whether the provision for compensation furnished by the statute is an adequate one is a practical question. It seems to us that the remedy which the statute in question furnishes against the corporation, supplemented by the remedies afforded by the general laws, if it refuses to pay the damages assessed, affords to any person whose property is taken or injured by the acts of the corporation a reasonable certainty that he will recover and receive compensation therefor. We are not, therefore, prepared to hold that the statute is unconstitutional, because it does not make adequate provision for compensation.

The case of *Connecticut River Railroad v. County Commissioners*, *ubi supra*, is quite different from the case at bar. In that case, in the statute which was held to be unconstitutional,



no person or corporation, neither the State nor the manager of the railroad, was made liable for the damages, but the plaintiff was left to look solely to a future uncertain fund, and he was provided with no means of enforcing his claim against the fund.

We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State. The language of the act is general, and puts all water rights upon the same footing, and applies to a proprietor outside the State. Such proprietor certainly has no greater rights than the citizen whose lands or water rights within the State are injured by the acts of the defendant under the authority of the Legislature. Whether the constitutional objection we have considered would be open to a citizen of another State, whose lands or water rights in that State are injured, we need not discuss nor decide.

It follows that the plaintiff cannot maintain this action for damages caused by any acts of the defendant which are authorized by the statute.

But these considerations do not dispose of the whole case. The defendant is liable in an action of tort, if it has exceeded the powers given it by the statute, and if, by any acts beyond its authority, it has damaged the plaintiff.

Section 5 of the statute provides that nothing in the act shall authorize the defendant "to raise the water of any of said ponds above high-water mark, nor to drain any of them below low-water mark." We have no doubt that this provision was intended to include the pond called Kenoza Lake, as well as the other two ponds named in the first section.

There was evidence that the defendant had built its dam and raised the water above high-water mark, and that it had at times drawn off the water below low-water mark. By thus doing, it exceeded its powers, and, if the plaintiff has sustained any damage by such unlawful acts, he can maintain this action. If the effect of raising the dam and the pond above high-water mark, or of lowering it below low-water mark, was to hold back the water and prevent it for a time from running in the stream as it would have done if the defendant had not committed the unlawful acts, the plaintiff can recover damages therefor, if any appreciable damage was thus caused him. There was evidence tending to show that, in July, 1882, the water ceased to flow in

the stream, and that the pond was then about eleven inches above the top of the opening in a culvert which was testified to as high-water mark, thus tending to show that, if the dam had been built so as to retain the water at high-water mark, the stream would have been supplied with some water.

We are of opinion that the evidence should have been submitted to the jury; and that they should have been instructed to give the plaintiff a verdict for such damages only as he proved were caused by the unlawful acts of the defendant in exceeding the powers conferred by the statute. *New trial granted.*

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GEORGE M. BROOKS, Judge of Probate, *vs.* CHARLES S.  
WHITMORE & another.

Middlesex. January 14. — September 8, 1886.

A trustee under a will gave a probate bond, with A. and B. as sureties. A. died, and D., who was a surety on another bond for the same principal as trustee of another estate, supposed that he was a co-surety with A. on the first-named bond, and petitioned the Probate Court to be discharged; and he was discharged accordingly. The trustee then gave another bond, in the same penal sum as the other, with B. and C. as sureties, which was approved by the judge of probate as "a new bond." The judge and the parties all acted under the same misapprehension as D. *Held*, that both bonds were valid; and that the sureties on each bond, after a breach thereof, were responsible in proportion to the several liabilities assumed by them.

CONTRACT, in two counts, against Charles S. Whitmore and George B. Brown. The first count was upon a probate bond, executed on May 25, 1875, by Whitmore as principal, and by George Phipps and Brown as sureties, in the sum of \$40,000, and conditioned for the faithful performance by the principal of the duties of trustee under the will of Ellen K. Stone. The second count was upon a similar bond, executed on February 6, 1877, by Whitmore as principal, and by Othello O. Johnson and Brown as sureties, in the same penal sum, and containing the same condition. The case was submitted to the judgment of this court upon the following agreed facts:

On May 25, 1875, the defendant Whitmore was duly appointed trustee under the will of Ellen K. Stone, widow of Dexter Stone, late of Framingham, deceased, testate, and accepted said trust, and gave bond in the penal sum of \$40,000, dated May 25, 1875, with George Phipps and the defendant Brown as sureties, which bond was duly examined and approved by the judge of probate on said day. Phipps afterwards died, and on February 6, 1877, Joseph A. White, who, with said Phipps, was a surety on a bond of said Whitmore, as trustee under the will of Dexter Stone, supposing that he was one of the sureties on said bond of May 25, 1875, petitioned the Probate Court to be discharged from further liability thereon, upon which petition a citation was issued to all persons interested in the estate, and a decree was entered in accordance with the petition.

On February 6, 1877, Brown and Othello O. Johnson, supposing that White was surety on the bond of May 25, 1875, and wished to be discharged from further liability thereon, and that there was no bond in force, executed the bond declared on in the second count, and on March 27, 1877, said instrument was examined and approved by the judge of probate as "a new bond." The petition of White, the citation and decree thereon, the execution, examination, and approval of the bond of February 6, 1877, and all acts done and performed in relation to the same were done and performed under a common misapprehension of fact, all the parties supposing that White was one of the sureties on the bond of May 25, 1875, whereas in fact White never was surety on said bond.

On January 9, 1883, Whitmore resigned his trust, which resignation was duly accepted. On September 4, 1883, Charles H. Adams was duly appointed trustee to succeed Whitmore, and accepted said trust. Whitmore filed his final account as said trustee, and, after a full hearing thereon, certain investments and payments were disallowed by the Probate Court, and a decree was entered by said court on November 13, 1883, charging him with \$12,358.48, from which decree no appeal was taken, and a portion of said amount remains unpaid to the person or persons entitled thereto according to law.

Upon the foregoing facts, such judgment was to be entered as the court might determine.

*S. W. Trowbridge*, for the plaintiff.

*H. K. Brown*, for the defendants.

DEVENS, J. The proceedings which resulted in giving the bond of February 6, 1877, which is claimed to have been approved as a substitute for the bond of May 25, 1875, were set in motion by one White, who erroneously supposed himself to have been a co-surety on the bond of 1875 with Phipps, then deceased. As the result of his petition, he was decreed discharged as surety thereon, and the bond of 1877 was approved for the same liability as the bond of 1875. White was in fact surety on an entirely different bond, signed by the same principal, as trustee for a different estate.

The judge of probate may order a new bond, which will supersede an old one, in two cases: first, on the petition of any person interested, setting forth that the bond is insufficient; and secondly, on the petition of a surety to be discharged. Pub. Sts. c. 143, §§ 5, 6. In the former case, notice is to be given to the principal; in the latter, to all persons interested. Notice was in fact given on the petition of White to all persons interested, but the decree discharging him from the bond of 1875 was necessarily ineffectual, as he was under no liability on that bond.

Acting apparently under the same error as the judge of probate, the principal on the bond of 1875 filed a new bond, which was approved. Although there was no petition of any person interested, setting forth that the bond of 1875 was insufficient, or of any surety thereon to be discharged, it is contended that the approval of the new bond operated to supersede the old bond; and this because the judge of probate may, of his own motion, at any time, determine a bond to be insufficient, and may order and accept a new one, and this without notice to any one except the principal on the bond. Assuming this to be so, although it is certainly debatable, no express authority to this effect being found in the statute, and the reasons why all persons interested in an estate might reasonably be heard on the sufficiency of the bond being obvious, yet the facts do not show any intention thus to act on the part of the judge of probate. He had decreed the discharge of White from the bond of 1875, on which he supposed him liable, with, as he supposed, the concurrence of the

parties interested therein, all of which was erroneous. To interpret the act that follows, namely, the approval of the new bond, as an adjudication of the insufficiency of the original bond, and the acceptance of a substitute therefor, is to give it too wide a scope. The judge of probate cannot have adjudged the original bond to be insufficient; he did not even know who the sureties on it were. He knew nothing of Brown's liability on the first bond. Brown had made no motion to be discharged therefrom, and the judge erroneously supposed White to be one of the sureties thereon. He was not dealing with any such instrument as the bond of 1875 in fact is. Under these circumstances, the validity of this bond was not impaired.

If the original bond continued valid, there remains the question whether any validity is to be attributed to the bond of 1877. That several bonds instead of one may be given, the sureties on which may be treated as co-sureties, in proportion to the several liabilities assumed by them, is not doubted. *Loring v. Bacon*, 8 Cush. 465. The judge of probate in the case at bar had not adjudged the surety on the original bond to be insufficient, nor had the surety, on his own request, been discharged from further responsibility. A new bond had been given, which had been approved. Without some action as to the bond which preceded, or as to the liability of the sureties thereon, this mere approval cannot be deemed a substitution of the new bond for the original bond, but only as an acceptance of the new bond as an additional security.

It is said, however, that, unless the original bond was discharged, the new bond was given under such a mistake of fact that there can be no liability upon it. But the new bond was voluntarily given, and it was accepted; there was no mistake as to its object or condition. Its obligation is just what the parties intended it should be, when they executed it. There was a misapprehension as to the reason for filing it, on account of the common error as to the liability of White on the bond of 1875, into which all concerned had fallen. But this was not an error into which the sureties were led, except by their own carelessness. It may be that they would not have signed it except to release White from the responsibility they supposed he was under, but the slightest examination of the original bond would have

shown that he was under no such responsibility as he and they supposed.

It cannot constitute any defence to the sureties on the new bond, that, by reason of the validity of the original bond, their liability will be less than they intended.

In the opinion of a majority of the court, the case of *Loring v. Bacon, ubi supra*, here applies. There should be judgment on each bond, and, *inter sese*, the sureties on the several bonds should be held responsible, in proportion to the amount of the bonds and the liabilities they have severally incurred.

*Judgment accordingly.*

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TRADERS AND MECHANICS' INSURANCE COMPANY *vs.*  
EPHRAIM BROWN & others.

Middlesex. March 17, 18. — Sept. 10, 1886. W. ALLEN & HOLMES, JJ.,  
absent.

A mutual fire insurance company was incorporated in 1848, subject to the provisions of the Rev. Sts. c. 87. In 1854, it was authorized, on receiving from the subscribers thereto a guaranty capital of a certain amount, to make insurance "otherwise than on the mutual principle," and was made subject to the Rev. Sts. c. 87, and all subsequent acts relating to insurance companies. To induce persons to subscribe to the guaranty capital, it adopted certain by-laws, by which the directors were authorized, before obtaining subscriptions, to determine the rate of the semiannual dividend, which rate should not be liable to be reduced without the written consent of each shareholder. The directors accordingly fixed such rate. The by-laws also provided that the funds of the company arising from premiums or assessments should be appropriated in a way which treated the mutual and stock departments as one. The St. of 1856, c. 252, § 36, provided that all business done by mutual insurance companies, on account of each department, should be kept separate. From 1854, the insurance company in question kept distinct and separate accounts of the business of the two departments. In 1882, the company, having a large surplus accumulated from the earnings of the stock department, voted to discontinue this department, and to redeem its guaranty capital. *Held*, on a bill in equity, under the Pub. Sts. c. 119, § 94, brought for this purpose by the company against the shareholders of the guaranty capital, that the by-laws were contrary to the provisions of the Rev. Sts. c. 87, and were void; that the company had acted rightly in keeping separate the accounts of the two departments; and that the shareholders of the guaranty capital were entitled to the surplus belonging to the stock department.

BILL IN EQUITY, filed October 4, 1883, under the Pub. Sts. c. 119, § 94,\* by a mutual fire insurance company, against the holders of certificates of its guaranty capital stock, to redeem and cancel said stock. Hearing before *Field, J.*, who reported the case for the consideration of the full court, in substance as follows:

The plaintiff was incorporated by the St. of 1848, c. 124, by the name of the Lowell Traders and Mechanics' Mutual Fire Insurance Company, "for the purpose of insuring dwelling-houses and other buildings, and personal property, within the Commonwealth, against loss by fire, with all the powers and privileges, and subject to all the duties, liabilities, and restrictions, set forth in" the Rev. Sts. cc. 37, 44. From the time of its incorporation until 1854, the company carried on business, in pursuance of its charter, as a mutual fire insurance company only.

By the St. of 1854, c. 76, the plaintiff was authorized, on receiving from the subscribers thereto a guaranty capital of \$50,000, to be paid in within two years, to "make insurance against fire and against maritime losses, otherwise than on the mutual principle; with all the powers and privileges, and subject to all the duties, liabilities, and restrictions, set forth in" the Rev. Sts. c. 37, "and in all subsequent acts relating to insurance companies." The act also changed the name of the company to the "Traders and Mechanics' Insurance Company."

The last-named act was duly accepted by said company, at a meeting thereof duly called and held on May 8, 1854; and at an adjournment of the same meeting, on June 19, 1854, the following by-laws, among others, were duly adopted by said company, as an inducement to make subscriptions to said guaranty capital:

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\* This section, which is a reenactment of the St. of 1881, c. 269, is as follows: "Any mutual fire insurance company authorized to issue policies on the stock plan, which cancels all outstanding policies issued by its stock department, and, at a meeting called for the purpose, votes to discontinue its stock department and to redeem its guaranty capital stock, may redeem and cancel the same in such manner and upon such terms and conditions as the Supreme Judicial Court, upon an application in equity made by the company, and after such notice of the application to all parties in interest as the court shall order, and a hearing, determines and adjudges to be just and equitable."

"Article 4. The directors shall cause books to be opened for the subscription of a guaranty capital of fifty thousand dollars (\$50,000), which shall be divided into shares of one hundred dollars each, and certificates issued therefor in such form as the directors shall prescribe. And, before such books are opened, the directors shall determine the rate per centum of the semi-annual dividend by vote, which shall be duly recorded; and the rate then determined shall not be liable to be reduced without the written consent of each and every shareholder."

"Article 10. The funds of this company arising from premiums or assessments, or in any other manner, shall be appropriated to the payment, first, of expenses; second, of losses by fire; third, dividends on the guaranty capital, and to make good any reduction in the amount of said capital; and fourth, return premiums and dividends on policies upon the mutual principle, as they shall expire.

"Article 11. In case the guaranty capital shall, from any cause, be reduced, the directors shall assess such sums as may be necessary to restore the same, upon the members of the corporation, in the manner required by the Revised Statutes to pay losses."

"Article 19. These by-laws, with the exception of the fourth article, may be altered by the votes of two thirds of the legal voters present at any annual or other legal meeting of the company, notice of the proposed alteration having been set forth in the call for such meeting; but the fourth article shall never be altered without the written consent of each and every holder of shares of the guaranty capital."

It was voted "that the same shall take effect when the capital stock shall be paid in, and that the directors be authorized to receive subscriptions to said capital stock at such times and in such sums as they may determine, and invest the same according to the provisions of the statutes."

The following by-laws were also adopted at said meeting:

"Article 1. Each person or corporation insured in this company upon the mutual principle shall be a member thereof, and subject to the by-laws and regulations of the company.

"Article 2. The annual meeting of the members of the corporation for the choice of directors shall be holden at the office



of said company, on the second Monday in December, in every year, at 2 o'clock P. M. Ten members shall constitute a quorum. All questions shall be decided by a majority vote, except such as shall be otherwise specially provided for in these by-laws. Each member shall be entitled to as many votes as he has policies upon the mutual principle, but no one member shall be allowed more than five votes. Special meetings of the corporation may be ordered by the president, or five directors, and shall be so ordered whenever twenty of the members request it in writing. Notice of all meetings of the corporation, signed by the secretary, shall be given in two or more newspapers published in Lowell, seven days at least before the meeting."

The directors of said company, at a meeting duly held, subsequently to the adoption of said by-laws and votes, voted "that the semiannual dividend to be paid on the guaranty capital be not less than four, nor more than five per cent, as the directors may from time to time determine."

None of said by-laws or votes have ever been altered or repealed. After the passage of the vote above named, the directors in behalf of the company, and in pursuance of the authority, and upon the terms, conditions, and inducements of the said by-laws and votes, obtained from various individuals subscriptions for, and the due payment of, the sum of \$50,000 as a guaranty capital. From 1854, the time of receiving said guaranty capital, until November 8, 1880, the company transacted insurance business upon both stock and mutual principles. It issued two forms of policies, one showing on its face that it was a stock policy, and the other showing on its face that it was a mutual policy.

By the St. of 1870, c. 232, the company was "authorized to increase its guaranty capital, by an addition thereto of the sum of fifty thousand dollars, to be divided into shares of one hundred dollars each." This act was duly accepted by the company, and, in pursuance thereof, the company, in 1870, received subscriptions for, and payment by various persons of, the additional guaranty capital, upon the same terms and conditions and inducements as it received the original capital, as above stated.

In 1854, when the company obtained its original guaranty capital, it had outstanding risks to the amount of \$3,729,834, on

which it had received cash premiums to the amount of \$21,483.58. It owed for losses ascertained and unpaid \$2422. Its assets consisted of premium notes of policy holders, to the amount of \$274,372.33, subject to assessment to twice that amount, and it had cash and other property valued at \$6902.96.

When the additional guaranty capital was obtained, the corporation had a surplus in cash assets of about \$184,000, and premium notes to about \$325,000, liable to assessment.

Since receiving its original guaranty capital, the company has always kept separate accounts of the business of the stock and mutual departments, and of the receipts and expenditures in each, and none of the assets or earnings of one have been applied to payment of losses or dividends of the other. It has paid from the earnings of the stock department semiannual dividends to the holders of the stock in the guaranty capital, amounting to not less than eight per cent per annum upon the par of said capital, from the time the same was paid in up to July 1, 1883, with the exception of a few months, (the exact time and amount of the omission, if material, to be ascertained by a master in chancery,) and the company has at various times paid from said earnings semiannual dividends of five per cent on said stock.

At a meeting of the company on November 8, 1880, it was voted, that the company discontinue issuing stock policies on and after November 30, 1880.

On January 18, 1882, the company, at a meeting duly called for that purpose, voted to discontinue its stock department, and to redeem its guaranty capital. The validity of this vote is not disputed. The holders of stock of the guaranty capital were not present nor represented at said meeting, and never consented to such discontinuance or redemption. Before the filing of this bill, the company cancelled all policies issued and outstanding in the stock department.

At the time of the filing of this bill, there was a surplus of more than \$40,000 above the par of its capital stock, accumulated from the earnings of the stock department above said dividends and all expenses, and remaining after the cancelling of said policies. (The exact amount thereof, if material, is to be ascertained by reference to a master.) And in the mutual department there were outstanding policies to the amount of \$17,621,921, the cash

premiums received thereon being \$126,682.98; and the company held premium notes of policy holders to the amount of \$253,365.96, liable to assessment to twice that amount, and cash and other property to the credit of the mutual department to the amount of \$381,478.98.

The judge found as a fact, if competent, that many of the defendants, the present holders of shares in said capital stock, paid a premium therefor above the par value thereof, and such shares have for many years commanded, and been sold at, a premium in the market.

By neither of the acts authorizing said capital, nor by any by-law or votes of the company or its directors, or otherwise, except so far as appears by the facts and statements herein and the public laws relating to said company, were any time or terms fixed or agreed upon for the liquidation, redemption, or canceling of said capital stock.

None of the earnings of the stock department have ever been paid as dividends to the holders of policies in the mutual department, or applied to payment of losses under policies issued by the mutual department, but the mutual department from time to time purchased shares of stock in the stock department, amounting in the aggregate, to the time of filing this bill, to three hundred and twenty-nine shares, which shares were held as assets of the mutual department, and the mutual department drew dividends thereon from the earnings of the stock department at the same rate as were paid to other stockholders; and the salaries, rents, and other general expenses of the company were divided between and borne by the two departments, in proportion to the amount of cash premiums received in the respective departments, up to the time of the discontinuance of issuing policies in the stock department, since which time the expenses have been divided as the directors have ordered. No policies were ever issued in the mutual department for a longer period than five years.

By the Boston fire of 1872, the guaranty capital was impaired to the extent of \$31,757.45. No assessment was made upon the mutual policy holders to make good this loss; but the same was immediately made good by premiums received from stock policies issued.

The company paid the tax assessed on account of its guaranty capital, and charged the amount so paid in its account of the business of the stock department.

The plaintiff contends that it should be authorized to repay to the parties entitled thereto the amount of the guaranty capital, together with such additional sum as said amount, if lent with safe collateral security, would have earned from the date of the filing of its bill up to the date of the final decree in the case.

The minority stockholders contended that the legal effect of the payment of the capital was to constitute the subscribers thereto members of a combined company, each with distinct and independent rights; that under the St. of 1854, therefore, the corporation became a stock and a mutual company, or "combined companies," each of which had a legal right in the joint management of the affairs of the corporation.

It was also contended, that, on the true construction of the St. of 1854 and the by-laws subsequently adopted, the capital was to be devoted to a business in which the stock department or company was the only real insurer, and that the capital was paid in on a trust for the exclusive benefit of the holders; that, by law, the guaranty capital, so called, was not in the nature of a debt of the mutual department of a mutual insurance company, but that the capital and surplus were the assets of a stock company, to be distributed on settled principles of equity; that in so far as the by-laws of the corporation purport to guarantee the principal or dividends thereon, or to authorize assessments of mutual policy holders to pay losses on the stock plan, or to make good a deficiency in the guaranty capital, or to exclude holders of shares from being members of the corporation, they were void.

It was also contended that the facts did not prove a contract between the parties, or between the mutual company and the original subscribers to the capital; that a decree ought to be entered dissolving the association; and that the assets of the stock company, including all the reserved or surplus earnings thereof, should be distributed to the stockholders, according to their several shares.

Other stockholders contended that the acts, by-laws, votes, and facts above set forth constituted a contract between the

corporation and the stockholders, whereby the corporation was bound to pay the stockholders, respectively, four per cent of the par value of their shares semiannually forever; and that, if it were relieved from the obligations of that contract, it should pay said stockholders the fair value of such contract to them, namely, the value of a perpetual annuity equal to \$8 for each share in the capital stock; or, if they were not entitled to such compensation, then they were entitled to have distributed among them, *pro rata*, the full value of all the assets of the stock department, and such further assets, if any, as had been improperly diverted therefrom, or applied to the benefit or expenses of the mutual department.

The case was reserved for the determination of the full court upon the questions whether the plaintiff was entitled to redeem its guaranty capital stock, and, if so, upon what terms and conditions, and generally upon all questions of law arising upon the report; it being agreed by the parties, that, if the court should decide, upon the facts found, that the plaintiff was entitled to redeem and cancel its capital stock, and the terms and conditions or principles on which this might be done, then, if any other facts than those found were necessary to be determined in order to apply these terms and conditions or principles to the subject matter, the cause might be referred to a master for that purpose, if the full court or a single justice should approve such a reference.

*G. F. Richardson*, (*D. S. Richardson* with him,) for the plaintiff.

*G. D. Noyes*, for the minority stockholders.

*E. R. Hoar*, for the other defendants.

GARDNER, J. In January, 1882, the plaintiff company voted to discontinue its stock department, and to redeem and cancel its guaranty capital stock; and has now, under the Pub. Sts. c. 119, § 94, applied to this court to determine upon what "just and equitable terms and conditions," and in what manner, this may be accomplished.

At the time of the passage of the St. of 1854, c. 76, authorizing the company to make insurance "otherwise than on the mutual principle," it was the intention of the Legislature to empower it to transact business upon the stock principle, in

addition to insuring upon the mutual plan, for which the company was chartered in 1848. The Rev. Sts. c. 37, made provision for the way and manner in which insurance companies should carry on business under the stock plan, and also under the mutual plan. The first twenty-three sections relate to stock companies, under the name of "insurance companies," and §§ 24-39 relate to "mutual insurance companies." As the corporation, prior to 1854, had been acting as a mutual company, the reference to the Revised Statutes in the St. of 1854 was to "all the powers and privileges," and to "all the duties, liabilities, and restrictions" contained therein, relating to stock companies. By the St. of 1848, c. 124, the company was empowered to make insurance upon the mutual plan, and, as such mutual insurance company, it enjoyed all the powers and privileges, and was subject to all the duties and liabilities, which the statutes imposed upon mutual insurance companies. The St. of 1854 gave it the additional right to insure "otherwise than on the mutual principle," and imposed upon it the laws governing companies conducting such business. The Rev. Sts. c. 37, refer only to stock companies, to mutual companies, and to foreign insurance companies. In those sections relating to stock companies, there was no limit to the number of stockholders; the directors, at such times as their charter or by-laws prescribed, were to make dividends of so much of the profits and of the interest arising from the capital as to them appeared advisable. The statement of the profits was to be laid before the stockholders biennially; and in certain contingencies the directors were made liable. It would seem that, under the Revised Statutes, if the company, in transacting business "otherwise than on the mutual principle," was governed by these laws, it was necessary to keep the business of each department separate and distinct.

Since its guaranty capital was paid in, the company has kept separate accounts of the business carried on in the stock and mutual departments, and of the receipts and expenditures in each. None of the assets or earnings of one department have been applied to payment of losses or dividends of the other. The dividends to shareholders have been paid from the earnings of the stock department. None of the earnings of this department have been paid as dividends to the holders of policies issued by

the mutual department. The salaries, rents, and other general expenses of the company were divided between and borne by the two departments, in proportion to the amount of cash premiums received by them respectively. The tax assessed on account of the guaranty capital was paid by the company, and charged to the stock department. Practically the company considered that, under a common board of directors, there were two separate and distinct organizations, one governed by the laws relating to stock companies, and the other by those relating to mutual companies. Two branches of business were conducted, each independent of the other, with distinct interests, but under a common head.

The by-laws which the company passed in anticipation of raising the guaranty capital were, in some respects, without authority of law. Article 4, which provided that, before the subscription books were opened, the directors should determine the rate per cent of the semiannual dividends, and that the rate thus fixed should not be reduced without the written consent of each and every shareholder, was in direct conflict with the Rev. Sts. c. 37, § 15. The dividends were to be made on profits, and depended on profits, and were to be made as to the directors appeared advisable. The company had no authority to establish them in the arbitrary manner attempted by this by-law.

Article 10 directed the manner in which the funds of the company arising from premiums or assessments, or from any other source, should be appropriated. By this article the funds were to be appropriated to the payment, first, of expenses; secondly, of losses by fire; thirdly, dividends on the guaranty capital, and to make good any reduction in the amount of said capital; and fourthly, return premiums and dividends on policies upon the mutual principle, as they shall expire. The Revised Statutes, c. 37, § 31, made provision for the appropriation of the funds of mutual companies in a different manner. This article of the by-laws contemplated no distinction between the two departments, and no division of their interests or funds.

Soon after the company was organized under its new plan, the St. of 1856, c. 252, was passed. It provided, in § 86, that "all business and all investments on account of the stock department of such [namely, mutual] companies shall be separately kept,"

and "the business done on the mutual principle shall also be kept separate." The plaintiff has complied with the statute, and has not followed the requirement of article 10 of its by-laws. The dividends have been paid from the earnings of the stock department, and no occasion has arisen to make good any reduction in the amount of the guaranty capital.

The plaintiff contends that the guaranty capital was practically a loan by the shareholders to the company, to enable it to carry on the stock business. Mutual fire insurance companies were required to have a guaranty capital before they could insure. The charter of the Berkshire Life Insurance Company contained a similar provision. In *Commonwealth v. Berkshire Ins. Co.* 98 Mass. 25, it was held that this guaranty capital was a liability; that it was in no proper sense a capital of the company; that the shares did not, as in stock corporations, represent aliquot fractional interests in the property and franchise; and that it was a liability rather than a part of the assets of the company. It was decided in this case that the corporation, a mutual insurance company, was not liable to a tax on its unredeemed guaranty stock, upon the ground that the fund stood as a security for the payment of losses upon policies; that it was tantamount to a debt due from the corporation, for the ultimate payment of which provision was constantly made; that the stockholders had no interest in the business of the company beyond the payment of their stipulated dividends, and the maintenance of the sinking fund out of which their stock was eventually to be redeemed. The court said: "By the St. of 1864, c. 208, §§ 1, 5, a return is required from, and a tax imposed upon, 'every corporation having a capital stock divided into shares;' which is computed on 'the excess of the market value of all the stock of each corporation' 'over the value of its real estate and machinery.' The return is also required to be made 'by the stock department of stock and mutual insurance companies.' These are companies which under one charter unite two separate branches of business, the stock department doing a stock business, and the mutual department a mutual business, each independent of the other, with distinct interests, and constituting two companies under one corporate organization." And the provision in the act to include the stock department of stock



and mutual companies, was considered as affording a strong presumption that the Legislature did not contemplate the taxation of mutual companies upon their guaranty stock.

In the case at bar, the company has regularly paid the tax upon its guaranty capital and charged it to the stock department. It is to be assumed that this would not have been paid by the company, unless it was done in compliance with the provisions of law, especially after the decision, in 1867, of *Commonwealth v. Berkshire Ins. Co.*, *ubi supra*. We think that there is a marked distinction between the guaranty capital referred to in the case cited, and the guaranty capital of a company doing business upon the stock plan, and that the capital of the latter is not a debt, and cannot be construed as a loan to the company to enable it to carry on the stock business.

The plaintiff contends that, in acquiring the fund, the company made certain promises set forth in the by-laws and votes of the directors; that the risks and liabilities were all upon the side of the corporation; that the subscribers and shareholders differed in no respect from every lender of money; that there was a written contract between the subscribers to the fund and the capital, and by that contract the rights of the parties thereto must be determined; that by this contract, as shown in the by-laws and votes, the shareholders were to take the dividends upon their stock as guaranteed to them, without any liability for losses; and that, if the capital should be reduced, it was to be repaired by the mutual department.

We have been referred to several statutes passed subsequently to the creation of the guaranty fund, for the purpose of showing that it has been the policy of legislation to keep the stock and mutual departments of companies organized to do business upon both plans distinct from each other, and not to subject mutual policy holders to any liability for losses in the stock department, or for any impairment of the guaranty capital. The St. of 1878, c. 141, § 2, provides that "the mutual policy holders shall not be entitled to participate in the profits of the stock department, nor shall they be liable to assessment to repair any deficiency in the guaranty capital arising from losses in said department; but said deficiency shall be repaired from the reserve fund of said department, and, if said fund is not

sufficient therefor, by the shareholders in the manner provided by law in the case of joint stock fire insurance companies." Although this statute was enacted several years after the plaintiff commenced doing business upon the stock principle, yet we think it states in general terms the law which governed such companies before its passage. The stock department was organized and governed by the laws governing stock companies. The mutual department was in like manner subject to the laws governing mutual companies. There was no legal authority for securing the contributors to the guaranty capital by the mutual company. The statutes fixed the liabilities imposed upon the holders of mutual policies, and the company could not enlarge these liabilities. The funds of such companies were to be appropriated first to pay the expenses of the corporation, and then to pay the damages which any member might be entitled to recover on his policy; and the directors were authorized to assess such sum as might be necessary to pay the same upon the members, in proportion to the amount of their premiums and deposits severally for seven years. Rev. Sts. c. 37, § 31. Section 38 provided that every member, at the expiration of his policy, should have a right to a share of the funds then remaining, after deducting payments of expenses and losses, in proportion to the sums actually paid on account of such policy.

If the business of the stock department was not sufficient to authorize dividends to be declared to the stockholders, there was no provision of law by which the members of the mutual department could be assessed for the purpose of making it up to them. The company had no right given it by statute to pledge its assets to the payment of dividends, or of deficiencies in the capital of the stock department. The statutes which regulated assessments prescribed also the manner of appropriating the funds so raised.

We think that this was not a contract between the subscribers to the guaranty fund and the company. The statute authorized the corporation to form the stock department. This department was to transact a stock business independently of the mutual department. Its interest was distinct and separate. The laws governing it were those which governed stock companies. The two had one controlling head, but in all other respects they

were each as distinct as though they had separate charters. We cannot agree with the plaintiff, that the subscribers to the guaranty fund were subject to no risk and no liability. The risk and liability to which they were subject were the same as if they had not been connected with the mutual department, but had been conducting business upon the stock principle only.

The surplus which the plaintiff now contends should be decreed to the company was derived from the stock department, from the profits of its business conducted under the guaranty capital, and from the gains of its profitable investments. Under the Rev. Sts. c. 87, § 15, the directors of the company, if it had appeared to them advisable, could have distributed the entire surplus among the stockholders as dividends. There is no provision of law by which it can be decreed to the mutual department of the company. Under § 38 of the same chapter, to which we have already referred, the mutual department was required by law to account for the accumulations of the stock department to each holder of a mutual policy as it expired, if the proposition contended for by the plaintiff is correct. And if the court should now decree that the mutual department of this company is entitled to any share in these accumulations, all the mutual policy holders during the thirty years that the guaranty capital has been in existence would be entitled to their proportionate share in the same.

The shareholders have deposited money and created the guaranty fund upon their own risk. If the business had been unsuccessful, they would have been the losers. The mutual department, notwithstanding its by-laws and votes, could not have been compelled to contribute to make good their losses. The surplus stands credited to the stock department, and it seems to us to be just and equitable that, in winding up the affairs of this department, this surplus, together with the guaranty capital, should be distributed among the shareholders of the fund, according to their several shares.

*Decree accordingly.*

**JAMES W. KENNEY vs. CONSUMERS' GAS COMPANY &  
another.**

**ATTORNEY GENERAL vs. CONSUMERS' GAS COMPANY.**

Suffolk. March 18. — Sept. 11, 1886. W. ALLEN & HOLMES, JJ., absent.

A bill in equity cannot be maintained to restrain a gas company from digging up, without the consent of the municipal authorities, the surface of the highway in front of the plaintiff's premises for the purpose of laying gas pipes, if the injury caused to the plaintiff is not of such a serious, permanent character that it cannot be adequately compensated in damages.

An information cannot be maintained, in the name of the Attorney General, at the relation of a private individual, to restrain a corporation from digging up the surface of the highway in front of his premises for the purpose of laying gas pipes, in the absence of evidence that a real and substantial injury exists or is threatened, and that the municipal authorities have refused relief, upon application to them, under the Pub. Sts. c. 106, § 77.

An information, in the name of the Attorney General, which is not brought *ex officio*, but at the relation of an individual, for the protection of his private interests against the acts of a corporation, cannot be maintained for the purpose of restraining the corporation from the further use of its corporate powers, and from usurping public franchises to which it is not entitled.

If a suit in equity does not present a proper case for equitable interference, the court will not usually entertain it, although the defendant makes no objection to the jurisdiction of the court.

C. ALLEN, J. The first of these cases is a bill in equity, brought by a private individual against the Consumers' Gas Company and one Smith, under whose direction the work was prosecuted, to restrain the defendants from digging up Terrace Street in Boston, in front of the plaintiff's brewery, for the purpose of laying gas-pipes. The only averments of damage to the plaintiff are, that he requires, for the convenient transaction of his business, the full use of the street in the neighborhood of his brewery for the going and coming of loaded teams to convey the products of his brewery; that on May 12, 1885, (which was the day of the commencement of the suit,) a large quantity of iron pipe was deposited along said street, adjacent to and in front of his property, and a body of men with pickaxes and shovels appeared in front of his property and began to destroy, and did destroy, the surface of the highway in front of and adjacent to the same, and to excavate a longitudinal trench in said highway; that said men were servants of the defendants;

and that the said opening of the highway adjacent to his said property has injured and impaired his facilities for doing business, and will continue to injure and impair the same, and be a great detriment to his property and business, and cause him great loss and damage; and that the said opening of the highway is a private nuisance, causing him especial damage of an irreparable character.

By the answer of the defendants, which was admitted to be true, it appeared that, on November 17, 1884, by a vote of seven to three, the aldermen of the city passed an order "that the Consumers' Gas Company of Boston is hereby granted the consent of the mayor and aldermen of the city of Boston, and is authorized and empowered, to dig up and open the grounds in the streets, lands, highways, and public places thereof, so far as is necessary to accomplish the objects of the said corporation, and to lay and maintain pipes therein, subject to the provisions and obligations contained in the Public Statutes of Massachusetts and the ordinances of the city of Boston. . . . Said company shall, upon opening the ground in any of the public places under this order, except for necessarily immediate and current repairs, give notice in writing to the superintendent of streets of its intention to do so, and all work done by authority of this order shall be done under the supervision and inspection of the superintendent of streets." The parties agreed that this order was not signed by the mayor, and that he undertook to veto the same by a message to the board of aldermen on November 24, 1884, in which he gave his reasons for declining to approve the order. The defendant corporation, by vote, accepted, assumed, and agreed to perform the burdens and obligations imposed upon it in the above order, and gave notice thereof to the mayor and aldermen; and on May 11, 1885, the day before the commencement of the work complained of, gave to the superintendent of streets written notice of its intention to proceed forthwith to dig up and open the ground in Terrace Street.

It further appeared, by the averments of the answer, that the acts of the defendants were done in good faith, in prosecution of the business for which the corporation was organized, and in a proper and workmanlike manner, and that they were necessary to accomplish the objects of the corporation.

If we assume, as contended by the plaintiff, that the order of the aldermen was invalid, we are still of opinion that the plaintiff is not entitled to the relief sought, for there is nothing in the case to show that the acts of the defendants had caused or were likely to cause any wanton or unnecessary injury to the plaintiff, or any greater inconvenience than would result from a temporary and brief opening of the street for the purpose of laying gas pipes therein. Even if it be granted that the injury which the plaintiff suffered was special and peculiar, differing in kind from the injury or inconvenience to the public at large, the facts by no means show a serious permanent injury, which cannot be adequately compensated in damages, and which calls for the issuing of an injunction. *Cummings v. Barrett*, 10 Cush. 186. *Washburn v. Miller*, 117 Mass. 376. *Parker v. Winnipiseogee Cotton Co.* 2 Black, 545. 2 Story Eq. Jur. § 925. 3 Pom. Eq. § 1350.

The second case is, in its essential character, an information and bill, quite informal in its structure, brought in the name of the Attorney General, upon the relation of James W. Kenney, seeking the same result as the bill brought by Kenney in his own name. The information is not brought on behalf of the Commonwealth, nor at the relation of the city, or of any of its officers; some of the averments contained in it are set forth as made by the informant, and others by the relator; and the relator makes oath "to the truth of the matters and things above stated of his knowledge; and as to the things stated upon information and belief, that he verily believes them to be true." The defendant filed a general demurrer, without specifying any objections for informality, and the case was reserved for the consideration of the full court, the counsel stating that the questions involved were most of them identical with the questions involved in the preceding case, and arose upon the same state of facts. The two cases were accordingly argued together.

We have no doubt that the court has jurisdiction, in proper cases, to restrain acts like those now complained of, upon the information of the Attorney General, either on behalf of the Commonwealth, or at the relation of a private individual. *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361. *District Attorney v. Lynn & Boston Railroad*, 16 Gray, 242. But in determining whether a proper case has been made out, all the

circumstances are to be looked at. In England, in cases like the present, where the court has refused to interfere, by way of injunction, special significance has been attached to the circumstance that the informations were not brought in behalf of the public, but merely at the relation of parties privately interested, who might themselves have instituted legal proceedings, if any special damage had been inflicted upon them. *Attorney General v. Sheffield Gas Consumers' Co.* 3 De G., M. & G. 304. *Attorney General v. Cambridge Consumers' Gas Co.* L. R. 4 Ch. 71, 81, 82, 84, 87. In the former case, Lord Cranworth went so far as to say, "I cannot but come to the conclusion, that the Attorney General, and the public here, are a mere fiction, and that the real parties concerned are only those that were parties to the first suit." (p. 313.) This, however, is not a controlling consideration; and, if an information is brought in cases where the principal interest involved is a private one, the introduction of a relator is proper, in order that he may be liable for costs. Pub. Sts. c. 198, § 19. 1 Dan. Ch. (4th Am. ed.) 14, 16.

But, while not doubting that cases might exist in which the interposition of the court would properly be sought to restrain the digging up of streets, we see no occasion for such interference here. In a very recent case, it has been declared that "the court will not interfere when the obstruction to the rights of the public is of such a character that it may with equal facility be removed by other constituted authorities and public officers. There must be a want of adequate, sufficient remedy, and the injury to public rights must be of a substantial character, and not a mere theoretical wrong." *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 516. By the Pub. Sts. c. 106, § 77, it is provided that "the mayor and aldermen or selectmen of a place in which pipes or conductors of such a corporation [i. e. a gas-light company] are sunk may regulate, restrict, and control all acts and doings of such corporation which may in any manner affect the health, safety, convenience, or property of the inhabitants of such place." A convenient tribunal is thus provided, with adequate authority to remedy all the grievances set forth in the information, which consist solely in the attempt to open and dig up Terrace Street. There is no averment that any application has been made to the mayor and aldermen, and relief refused.

The case thus falls directly within the principle of the decision in *Attorney General v. Metropolitan Railroad*. See also *Attorney General v. Bay State Brick Co.* 115 Mass. 431, 438. In a case which, like the present, is brought to sustain private interests, there is no occasion for the interference of this court, at least until it appears that a real and substantial injury exists, or is threatened, and that the mayor and aldermen have refused relief, upon due application to them.

The information also prays that proceedings in the nature of a *quo warranto* shall be taken by the court, to restrain the defendant from further use of its corporate power, and from usurping public franchises to which it is not entitled. But if the Attorney General seeks such a remedy, it should be by an information *ex officio*, and not by an information brought primarily for the protection of private interests. *Commonwealth v. Union Ins. Co.* 5 Mass. 230, 232. *Rice v. National Bank of the Commonwealth*, 126 Mass. 300.

For these reasons, we are of opinion that the bill must be dismissed, and the demurrer to the information sustained; although the defendant, by not insisting in argument upon these grounds of objection, has, by implication, waived them. Cases not proper for equitable interference are not usually entertained, even though parties consent. *New England Ins. Co. v. Phillips*, 141 Mass. 535, 546. *Dunham v. Presby*, 120 Mass. 285, 289.

*Bill dismissed.*

*Demurrer to information sustained.*

*B. F. Butler, (J. J. McDanitt with him,) for the plaintiffs.*

*R. M. Morse, Jr., (E. R. Hoar with him,) for the defendants.*



JOHN W. MCKIM, Judge of Probate, *vs.* ALONZO D. HIBBARD,  
executor.

Suffolk. March 8. — Sept. 16, 1886. W. ALLEN & HOLMES, JJ., absent.

A trustee under a will filed an inventory in the Probate Court, in which certain shares of stock in a corporation were valued at a certain sum. Subsequently he wrongfully sold the shares, and converted the proceeds to his own use. In an action against a surety on his bond, it appeared that the market value of the shares on the day the same were transferred on the books of the corporation was less than the valuation in the inventory; but it did not appear what the market value was on the day they were sold, or what amount the trustee received for them. *Held*, that the trustee could not object to being charged with the valuation in the inventory.

A trustee under a will, which gave him the power to sell and dispose of the trust estate, and to reinvest the proceeds, from time to time, as he should deem advisable, filed an inventory in the Probate Court, in which certain shares of stock in a corporation were valued at a certain sum. He then sold the shares for the purpose of converting them to his own use, and appropriated the proceeds. In his subsequent accounts he represented the shares as in his possession. *Held*, in an action on his bond, that a surety thereon could not object to being charged with the market value of the shares at the date of the writ, with all dividends declared thereon to that time.

A testator, by his will, gave certain property in trust for the benefit of two children; and provided that, during their minority, interest was to be added to the principal, and that, after that period, each child was entitled to the income of his portion, and, under certain circumstances, to the principal or a part thereof. When the elder child became of age, the trustee rendered an account of the property held by him for the benefit of both children, including accumulations to a certain amount; and, two years and a half afterwards, a settlement was made between the trustee and the elder child on the basis of this account, and the income of his proportionate share, with its proportionate accumulation, from the date of his majority to the date of the settlement, was paid to him, together with a certain sum out of his share of the principal as accumulated. In fact, the trustee had before these settlements wrongfully sold and appropriated all of the trust property. *Held*, in an action against a surety on the trustee's bond, that the surety was chargeable with interest upon the elder child's share of the principal, with its share of added accumulation from the date of his majority to the date of the writ; and that a rest was properly made as of the former date. *Held, also*, that the surety was chargeable with interest on the younger child's similar share from the date of the elder child's majority; and that a rest should be made at the date of the younger child's majority, which was before the date of the writ.

If a trustee misappropriates the trust property, and, in an action against a surety on his bond, the surety is charged with the full amount of the trust property to a period later than the misappropriation, a sum equal to commissions which the trustee would have earned if the estate had been properly administered should be deducted, and also the amount of taxes paid by the trustee, although they were paid to conceal his embezzlement.

If a trustee sells securities belonging to the trust estate, and converts the proceeds to his own use, in an action against a surety on his bond interest should be computed on the amount converted from the day it is found to be due up to the day of issuing the execution, without making a rest at the date of the writ.

CONTRACT, against the executor of the will of William C. Hibbard, upon a probate bond, dated January 8, 1866, and executed by James W. Rollins as principal, and by Joseph R. Bassett and said Hibbard as sureties, in the sum of \$30,000, and conditioned for the faithful performance by the principal of the duties of trustee under the will of Charles Barstow. The case was referred to an assessor, to whose report both parties took exceptions, which were heard before *C. Allen, J.*; and, at the request of the parties, the case was reserved for the determination of the full court. The facts appear in the opinion.

*I. R. Clark*, for the plaintiff.

*J. D. Ball*, for the defendant.

DEVENS, J. The trust estate of which James W. Rollins was trustee was intended for the benefit of three children, a daughter and two sons, of the testator, by whom it was originally created in equal proportions of one third part to each. The income was to be added to the principal until the marriage or majority of the daughter, who was the eldest of the children. Upon the marriage of the daughter or her majority, the proportion of the trust estate intended for her benefit, together with its proportion of the accumulated income, was to be held in trust for her benefit during life, and the income thereof paid to her quarterly. Upon the arrival of each of the sons, respectively, at majority, the trustee was authorized, with the approval of the testator's widow, to pay to each his proportionate one third of the trust estate, with its proportion of accumulated income. But if, in the opinion of the trustee and widow, if living, it would not be for the advantage of either of the sons to receive his proportion with its accumulation, the income thereof was to be paid to him during life, or until such time as, in the opinion of the trustee and the widow, if living, it would be for his best interest that he should receive his proportionate share, it being held in the mean time by the trustee. Upon the decease of each of the sons, the proportion of the trust estate held for his benefit was to be paid to his children, and, if he died leaving no

children, to his heirs at law. Upon the decease of the daughter, the proportion of the trust estate held for her benefit was to be paid to her children, and, if she died without children, was to be treated as a portion of the testator's residuary estate. The will contained an authority, by which, in case the provision made by the testator under another clause of his will for the maintenance and education of his children during their minority should prove insufficient, the income of the trust estate, directed to be accumulated, might be used for these purposes. Power was also given to the trustee to sell and dispose of the trust estate, and, with the proceeds, to purchase other property to be held upon the same trusts, and to change investments as, from time to time, he should deem it advisable.

On January 31, 1866, Rollins, as trustee, filed an inventory of the estate thus held in trust by him. The daughter, Anna D. Barstow, became of age on January 26, 1868, when the trustee, as he testified, set off to her "theoretically and in his mind," but without any actual division, a third of the trust estate. On December 6, 1869, he presented his first account, by which it appeared that no income had been paid to the sons since the commencement of his duties under the trust, but that there had been paid to the daughter, from income received after her majority, \$849.88. The trustee rendered no subsequent account to the Probate Court, and, failing to comply with the order of the court in relation thereto, this suit was brought upon his bond, on November 30, 1881. No property was at that time held by him for the trust estate, and none has been delivered over by him to his successor, but certain amounts had been paid over from time to time by him to the different children, and accounts had been rendered to them severally, in which he represented himself as still holding in his hands the property, or a large portion of the property, as stated in the inventory returned to the Probate Court, except certain Concord Railroad shares, concerning the disposition of which no question now arises. All the trust property had been squandered by him in speculations as early as 1875, but the condition of the trust fund was not known until June, 1880.

Charles F. Barstow, the elder son, became of age on May 16, 1873, and on November 17, 1875, the trustee made up and

settled with him an account of the net income from the date of his majority, represented to have been realized on his share of the principal sum, with its accumulations from that date, paying him the same, together with \$2000 of this principal, his mother approving the latter payment.

Henry T. Barstow, the younger son, became of age on November 11, 1879. In April, 1880, the trustee rendered to him an account based on that of May 16, 1873, (when Charles F. Barstow became of age,) purporting to show the net income on his share as it stood on May 16, 1873, and from that date the investment of principal and income, and reinvestments, as they stood in April, 1880, together with certain payments, &c. made.

The report of the assessor, included in the reservation of the case, gives fully the facts connected with the maladministration of this trust estate, and also the methods the assessor has adopted in determining the liabilities of the trustee. It will not be necessary to recapitulate them, except as we may do so in considering the exceptions thereto filed by the plaintiff and the defendant.

We consider those of the defendant, as those of the plaintiff may be incidentally dealt with.

1. The defendant objects that certain shares of the Philadelphia, Wilmington, and Baltimore Railroad, which were sold by the trustee, the proceeds being appropriated to his own use, have been charged to him as of their inventoried value, although it appears that their market value on July 10, 1871, when they were transferred on the books of the corporation, was \$2.50 less on each share. The trustee wholly failed to show what he actually received for them, or when he sold them, and, in the absence of this evidence, the assessor was fully justified in holding him liable for the inventoried value. Where an actual loss properly sustained is shown, a trustee is not liable; but no such actual loss was shown, nor was the stock sold by the trustee in the discharge of any duty. Whatever the market price, he is properly chargeable with the inventoried value, certainly when he fails to show what he actually obtained. But while we have passed upon this question as presented by the exception, it is apparently not now of importance, if it shall be found that the

assessor correctly held that the trustee might be held responsible for the value of this stock as of the date of the writ.

2. The assessor has held, both as to the shares of the Philadelphia, Wilmington, and Baltimore Railroad, and other shares in certain railroad companies (except the Concord Railroad shares) which were included in the trustee's inventory, and which he has constantly represented in all accounts rendered by him as being in his possession, that the trustee is liable for the value of the same as that value was on November 30, 1881, the date of the writ; and, further, that the trustee is properly chargeable for all the dividends that were payable on the same up to that time. The defendant contends, by his second and third exceptions, that he can only be held liable for the market value of the shares when they were sold by the trustee, together with interest from that time, and for such dividends as were payable up to that time.

Under the power given by the will to the trustee, to sell and dispose of the trust property, to reinvest the proceeds, and to change investments as he might deem advisable, the defendant contends that the trustee should be charged with the market value of the stocks at the time of sale, with interest thereon, as the wrong done consisted, not in the sale, which might lawfully have been made, but in the misappropriation of the proceeds. If the trustee had sold the securities for the honest purpose of reinvesting the proceeds, and subsequently, yielding to temptation, had misappropriated the funds, some force might be attributed to this argument. In *Fowle v. Ward*, 113 Mass. 548, it was held that, where one to whom shares had been pledged as collateral security sold them wrongfully, but for the full market price at the time, the plaintiff was entitled, on a bill in equity to redeem the shares, to be placed in the same position as if the sale had not been made; and that, if he could not replace them, the defendant might be charged with the value of the shares at the time of filing the bill. To the same effect are *Sewall v. Boston Water Power Co.* 4 Allen, 277, and *Emory v. Parrott*, 107 Mass. 95. The sales in each of the cases cited were wrongful and illegal, but they are not therefore distinguishable from those made by the trustee in the case at bar. These sales were equally wrongful and illegal; they were not a

part of an honest transaction, by which an investment of the trust estate was to be changed, but of a transaction by means of which the funds were to be misappropriated. The object of the sales is found to have been, not the execution of the trust reposed in Rollins by the testator, but an abuse of it. The assessor has found that Rollins sold the shares for the purpose of converting the same to his own use. He cannot shield himself from the consequences of a dishonest act under an authority conferred only to be exercised for an honest purpose. In the cases cited, as in that at bar, the party wrongfully selling had all the muniments of title, the means of selling, and of conveying a good title to an innocent purchaser. Were these shares now in the hands of Rollins, a conveyance of them to the present trustee might be compelled. As they are not there by reason of his own wrongful act, he and his sureties are properly held responsible for their value at the time when suit was brought, together with the value of the dividends which he might have received, and has heretofore pretended that he had received. The argument that, if this is so, and that, if shares sold under similar circumstances should be worth less at the date of the writ than their market value when sold, all that could be recovered would be the lesser value, is far from sound. The party injured may properly have the option of ratifying the sale wrongfully made, and receiving the proceeds of the same with interest, or of insisting upon the return of the shares of stock, with the dividends, into the trust estate, or, failing this, of receiving their value at the time of the suit brought. 2 Story Eq. Jur. § 1263.

3. On May 16, 1873, when Charles F. Barstow, the elder son, became of age, the trustee rendered an account of the trust property held by him for the benefit of the two sons, including accumulations, real or pretended, to the amount of \$3148. This account treated the property which he had previously disposed of as still in his hands. On November 17, 1875, a settlement was made between the trustee and Charles F. on the basis of this account, and the income of his proportionate share, with its proportionate accumulation from May 16, 1873, the date of his majority, to November 17, 1875, was paid to him, together with \$2000 out of his share of the principal as accumulated, with the approval of his mother. The defendant by his fourth exception

objects that, except where dividends have been charged, interest has been cast upon Charles F.'s share of the principal, with its share of added accumulations from May 16, 1873; and that a rest was made as of that date. During the minority of each of the three children, except in certain cases not necessary now to be considered, interest was to be added to the principal. From and after that period, the beneficiary was entitled to the income of his or her portion, and, under certain circumstances, to the principal, or a part thereof. It was necessary to ascertain, at the time when Charles F. arrived at majority, what his share of the principal with the accumulations then was, and upon this, as a new principal, he was thereafter to receive interest or income. It was therefore correctly held by the assessor, that, except where the trustee was charged with dividends, he should be charged with interest thereon.

In this connection, it may be proper to deal with the defendant's sixth exception, which is, in substance, that the settlement with Charles F. Barstow on February 16, 1876, which was on the same basis as that of November 17, 1875, already adverted to, and a previous one with Anna D. Barstow on January 27, 1873, were erroneously upheld by the assessor. Anna D. Barstow became of age in 1868, and the trustee "theoretically and in his mind set off to her" a certain share of the property. In 1869, he rendered a probate account, which was allowed, and he then had the trust property. The settlement with Anna D. of January 27, 1873, was a settlement of the income on her share from her majority to that time. The accounts then rendered were not treated by the assessor as conclusive, but as evidence. That there should be a rest, having relation to the time when each child became of age, that thereafter it might have the interest or income of the accumulated principal, we have already stated. The defendant contends that the statements made by the trustee in these settlements were false; that he had disposed of all the trust property at the time; and that therefore they should be disregarded. These statements were made by the trustee in the discharge of his duty, and they do not embrace more than the trustee was bound to account for in the way of interest or dividends, and by them the sureties must be bound. *McKim v. Blake*, 139 Mass. 593. Apparently, if these settlements were

wholly set aside, and the trustee's charges and commissions disallowed, as in such case they should be, simple interest on the principal sums, with the gains made on the sales added, would exceed what was settled for as income realized. We see no reason for disturbing them. According to the accounts as rendered, accumulations had been added to principal in such a manner as was just and reasonable, or, more properly, in such a manner as would have been so, but for the fact that they were all based on the fiction that the trust property was in existence.

4. The fifth exception of the defendant is to the allowance of interest on Henry T. Barstow's share from May 16, 1873. The trustee on that date had made, rendered, and settled his account to that date with Charles F. Barstow. The account was made of the estate of both sons. It included the income, which from that time, so far as the share of the elder son was concerned, was to belong to him, while that of the younger was to be accumulated still, as his minority had not expired. Not only was no injustice done the trustee in compelling him to account for interest on this sum from that time, but, on this point, we think that the contention of the plaintiff is correct, and that, instead of computing the income from May 16, 1873, without a rest, one should be made on November 11, 1879, adding, at the date of Henry T.'s majority, the then accumulated interest; and that, in this respect, the report of the assessor should be modified.

We have already passed on the defendant's sixth exception; and his seventh exception was waived.

5. The defendant's eighth exception is to the failure to allow commissions, or a sum equal to commissions, to the trustee. If the defendant is to be charged with the property and the income, whether from interest or dividends, in full, there should be such deductions as would have been made if the estate had been properly administered. While commissions, *eo nomine*, have not been earned by the trustee, yet, as he is to be treated as if he had faithfully administered the trust, and is to be held to the fullest responsibility, a sum equal to them may properly be deducted. Up to the dates of the settlements made with Anna D. Barstow and with Charles F. Barstow, commissions are included in the settlements, as made with them. The trustee is not to be allowed in any form such deduction more than once, but his wrongful



conduct and acts of embezzlement and misappropriation should not enable the representatives of the estate he has abused to recover more than properly belongs to it, or compel the sureties to do more than indemnify the trust estate. For a similar reason, the trustee should be allowed for the taxes paid by him after 1875. They were undoubtedly paid wrongfully, to conceal and cover up the fraud he had committed, but they were a proper charge upon the trust estate, if it had actually existed; and, when the trustee is held responsible for the full income, they are, as against his sureties, a proper and necessary deduction therefrom.

6. The defendant, by his ninth exception, further contends that the assessor has erroneously computed interest up to the date of the writ, and then made a rest, whereas interest should have been computed and charged to the date of the execution, no rest being made at any previous time. This, the defendant urges, is in violation of the rule laid down in *McKim v. Blake, ubi supra*. The contention of the plaintiff in *McKim v. Blake* was, that interest upon the principal found by the assessor to be due should be computed to the date of the judgment, and the amount then due thus ascertained; and that interest on that amount should be computed therefrom to the day of issuing the execution. But it was held by the court, that interest on the amount converted by the trustee should be computed from the day the assessor found it to be due up to the day of issuing the execution, without any intervening rest. We do not understand from the assessor's report that he proposes to make a rest at the date of the writ, and then compute interest upon the sum found due at that time. As a matter of convenience, he has carried his computations of interest to the date of the writ, but his report contemplates that they should be carried to the date when execution is awarded. That they should be thus continued seems to us clear, as the trust estate can in no other way be indemnified. As further claim for dividends on the stock would cease at the date of the writ, when the plaintiff is to receive their value as of that time, there should be interest on this value from that date to that of issuing the execution, and the interest also on the sums of money which the trustee held, or should have held, should be continued up to that time, without making a rest at the date of the writ.

We have incidentally disposed of all the exceptions argued by the plaintiff in considering those presented by the defendant.

From any amount which the plaintiff would otherwise be entitled to recover, certain deductions are to be made by reason of payments since the suit was brought, but we have not thought it necessary to enter into the computations which will be required to determine the precise sum for which execution should issue, as we have fully indicated the rules according to which they should be made.

The result is, that we adopt the theory set forth by the assessor in settling the account of the trustee, with the following modifications:

1. That, in computing interest, a rest should be made in the account of Henry T. Barstow when he became of age, on November 11, 1879.

2. That the defendant should be allowed a sum equal to the usual commissions for services not included in the accounts rendered and settled by the trustee; such allowance to be as of the date of the writ.

*Ordered accordingly.*

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CHARLES A. ATKINS vs. MERRICK THREAD COMPANY.

Hampden. Sept. 28. — Oct. 13, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

In an action for personal injuries received by the plaintiff while in the defendant's employ, through the alleged neglect of the defendant to provide the plaintiff with safe and suitable machinery and tools, and to give him suitable and proper instructions as to the manner of doing his work, the judge declined to rule, as requested by the defendant, that, "unless the jury find that the plaintiff was a man of manifest imbecility, their verdict must be for the defendant, because the defendant had a right to assume that the plaintiff would protect himself by whatever precautions were necessary." *Held*, that the defendant had no ground of exception.

TORT for personal injuries received by the plaintiff while in the defendant's employ, through the alleged neglect of the defendant to provide safe and suitable machinery and tools, and

to give suitable and proper instructions as to the manner of doing the work required to be done by the plaintiff at the defendant's mill.

Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions, in substance as follows :

After the evidence in the case was all in, the defendant asked the judge to give the following instructions to the jury: "1. If the jury find that the plaintiff had such information or knowledge as would enable him, with a reasonable exercise of care on his part, to do his work with safety to himself, the defendant is not liable, and it makes no difference how, from what source, or when he derived such information or knowledge, whether from the defendant's officers or servants, from a stranger, from previous experience, or from his own perceptions and intelligence. 2. If the jury find that the plaintiff had such information or knowledge, from whatever source derived, as would enable him, with a reasonable exercise of care on his part, to do his work with safety to himself, the defendant was not bound to give him any instructions, and is not liable. 3. If the jury find that the defendant, from anything said or done by the plaintiff when he entered the defendant's employ, had reason to believe that the plaintiff had such information or knowledge as would enable him, with a reasonable exercise of care on his part, to do his work with safety to himself, the defendant was not bound to give him any instructions, and is not liable. 4. If the jury find that the plaintiff, at any time, by word or act, declined or objected to instructions from any of the defendant's officers or servants whose duty it was to give them, and that the defendant's machinery was suitable and proper for the work to be done upon it by the plaintiff, then the defendant is not liable. 5. If the jury find that the accident was caused partly by the plaintiff's own negligence, then it was not in a legal sense caused by the negligence of the defendant. In such case it was caused by both parties, and being the result of a commingling of the negligence of the two parties, the plaintiff cannot recover. 6. Unless the jury find that the plaintiff was a man of manifest imbecility, their verdict must be for the defendant, because the defendant had a right to assume that the plaintiff would protect himself by whatever precautions were necessary."

The judge gave, in substance, the first five instructions requested, and refused to give the sixth.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

*H. K. Hawes*, for the defendant, cited, among other cases, *Russell v. Tillotson*, 140 Mass. 201.

*G. M. Stearns & W. W. McClench*, for the plaintiff.

BY THE COURT. It is the duty of a master, who sets a servant to work in a place of danger, to give him such notice and instruction as are reasonably required by the youth, or inexperience, or want of capacity of the servant. This duty is not confined to cases where the servant is "a man of manifest imbecility," and the sixth instruction requested by the defendant was rightly refused.

*Exceptions overruled.*



### JOSEPH H. NORTON vs. CHARLES E. PALMER.

Berkshire. Sept. 4. — Oct. 21, 1886. DEVENS, W. ALLEN, & C. ALLEN, JJ., absent.

A mortgage of land was given to secure the payment of a certain sum of money in instalments at different dates, for which promissory notes were given. A. held two of the notes by gift from a person, to whom they were indorsed by the mortgagee, with an oral agreement to hold the mortgage in trust to secure them. The mortgagee afterwards transferred the other notes and the mortgage to B., who had notice of this agreement. B. received payment of his notes, surrendered them to the mortgagor, and afterwards assigned the mortgage to A. Interest was paid on the two notes held by A., and the mortgage was recognized as outstanding by the mortgagor, who conveyed the land to C. by a deed which also referred to a mortgage as outstanding. *Held*, that A. could maintain a writ of entry to foreclose the mortgage against C., brought within twenty years of such payment of interest, although the notes were barred by the statute of limitations.

HOLMES, J. This is a writ of entry, dated January 15, 1884, to foreclose a mortgage given by Henry Palmer to Willis Strickland in October, 1837, to secure a series of promissory notes payable at different dates. The condition of the mortgage was the payment of the sum of \$2100, in specified sums and at various times mentioned, the last instalment being payable on

April 1, 1850. On performance of the condition, the deed and thirteen promissory notes were to become void. The notes were not witnessed. The demandant holds two of these notes by gift from Allen Hawley, to whom they were indorsed by the mortgagee, with an oral agreement to hold the mortgage in trust to secure them. The mortgagee afterwards transferred the other notes and the mortgage to Lyman Strickland, who had notice of this agreement. Lyman Strickland received payment of his notes, surrendered them to the mortgagor, and later assigned the mortgage to the demandant.

The main argument for the tenant, as we understand it, is, that a transfer of one of several mortgage notes carries no equitable interest in the mortgage if nothing is said, and that an oral understanding that it shall remain secured is an attempt to create a trust without writing, which does not help the case; and that, the two notes held by the demandant thus having been detached from the mortgage, it was satisfied when the other notes were paid, and the demandant got no new rights under it by the subsequent assignment to him. The fallacy is in the first premise, which presses a mere suggestion made by Chief Justice Shaw, but without expressing an opinion, in *Young v. Miller*, 6 Gray, 152, 154, 156, as to whether a trust would be implied if nothing was said, into authority for a much broader proposition. When the understanding is, that the mortgage shall continue to secure the note according to its terms, there is no more difficulty in making the mortgagee a trustee for the holder of one note than there is in making him a trustee for the holder of all, when all are transferred, and *Young v. Miller* intimates as much. Moreover, Chief Justice Shaw's doubt does not seem to have been felt by those courts before which the question has come for decision. *Moore v. Ware*, 38 Maine, 496. *Keyes v. Wood*, 21 Vt. 331. *Belding v. Manly*, 21 Vt. 550. *Donley v. Hays*, 17 S. & R. 490. *Pattison v. Hull*, 9 Cowen, 747. *Cooper v. Ulmann*, Walk. (Mich.) 251. *Walker v. Schreiber*, 47 Iowa, 529. See *Bassett v. Daniels*, 136 Mass. 547, 548. The mortgage was not extinguished by payment of Lyman Strickland's notes, but remained outstanding in trust, seemingly without question on the part of the mortgagor, and was afterwards lawfully transferred to the demandant, who was equitably entitled to it.

Interest has been paid on the two notes, and the mortgage has been recognized by the mortgagor within twenty years as outstanding. The deed from the mortgagor to the tenant also refers to a mortgage as outstanding, which the court may well have found to be the one in suit. If the notes were barred by the statute of limitations, the mortgage was not, and a writ of entry could be brought upon it. *Thayer v. Mann*, 19 Pick. 535.\* *Heburn v. Warner*, 112 Mass. 271, 274. *Hancock v. Franklin Ins. Co.* 114 Mass. 155, 156. *Hannan v. Hannan*, 123 Mass. 441, 442.

We do not discover what the tenant has to complain of in the ruling that, on the facts found and properly to be found from the evidence, the mortgage was valid in the hands of the demandant. The findings of fact set forth seem to have been required by the evidence, and there was other evidence not reported.

*Exceptions overruled.*

*J. Branning*, for the tenant.

*J. Dewey*, for the demandant, was not called upon.

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\* The exact language of the condition of the mortgage in *Thayer v. Mann* does not appear in the report. It is there stated that "the mortgage was conditioned for the payment of three promissory notes." Mr. Justice Putnam, however, states that "a reference to the condition contained in the mortgage shows that it is to be and remain in full force until the debt shall be paid." From the mortgage on file in the office of the clerk of the courts in Norfolk county, it appears that the condition was as follows: "Provided nevertheless, that if the said Thomas Stanley Mann, his heirs, executors, or administrators, pay to the said Cobb, his heirs, executors, administrators, or assigns, one sum of six hundred dollars on demand, with interest from the twenty-fourth day of February last, and one sum of three hundred and fifteen dollars on demand, with interest from the twenty-fifth day of said February, and one sum of five hundred and eighty-five dollars on demand, with interest from this date, then this deed as also three certain notes, bearing date as aforesaid, given by the said Thomas Stanley Mann to pay the same sums at the times aforesaid, shall all be void, otherwise shall remain in full force."

ELIAS F. PECK *vs.* BENJAMIN F. CLARK.

Berkshire. Sept. 15. — Oct. 21, 1886. DEVENS, W. ALLEN, & C. ALLEN, JJ., absent.

In an action for the conversion of the waters of a spring, it appeared that the plaintiff owned the right, reserved by the grantor in a deed of land, of "the spring of water on said premises;" and that a stream of water running on the land was the outlet of a spring a short distance off on the adjoining land, and was finally lost in the ground. The plaintiff's evidence tended to show that there was no other spring; and he introduced the evidence of persons who had long lived in the vicinity of the stream and known of it, that it was called a spring. *Held*, that this evidence was admissible.

In an action for the conversion of the waters of a spring, it appeared that the plaintiff owned the right, reserved by the grantor in a deed of land, of "the spring of water on said premises;" and that a stream of water running on the land was the outlet of a spring a short distance off on the adjoining land, and was finally lost in the ground. The plaintiff offered in evidence the declarations of his deceased grantor, made on the land when he conveyed to the plaintiff, that he intended to carry this stream of water off the land, and that he called it a spring. *Held*, that this evidence was inadmissible.

In an action for the conversion of the waters of a spring, it appeared that the plaintiff owned the right, reserved by the grantor in a deed of land, of "the spring of water on said premises;" and that a stream of water running on the land was the outlet of a spring a short distance off on the adjoining land, and was finally lost in the ground. The grantee of the land testified for the plaintiff that there was no other water or spring on the land at the time he purchased it, or during his ownership, than this little stream of water; and that he understood, at the time he purchased, that this stream was the water reserved in the deed to him. *Held*, that the defendant had no ground of exception to the admission of this evidence.

If a deed of land reserves to the grantor, his heirs and assigns, "the spring of water on said premises, and the right to lay down, repair, and rebuild aqueduct and pipe, and convey said water off from said premises, together with the right to fix said spring and do any other act or thing necessary for taking off said water," and a grantee of the land subject to the reservation puts in an aqueduct, which diverts the water continuously, an owner of the right reserved to the grantor is entitled, in an action against such grantee for an interference with his rights, at least to nominal damages.

At the trial of an action for the conversion of the waters of a spring, by means of an aqueduct, if the ruling of the judge requires the jury to find that the defendant put in the aqueduct and withdrew the water without the plaintiff's consent, the defendant is not entitled, after the charge to the jury is finished, to single out particular circumstances tending to show consent, and require the judge to comment on them specially.

TORT for the conversion of the waters of a spring, and for interfering with the plaintiff's right to use the same. Trial in

the Superior Court, before *Bacon, J.*, who allowed a bill of exceptions, in substance as follows :

The plaintiff, by mesne conveyances, owns the rights reserved in a deed of Charles F. Benton to Jane M. Darby, dated March 1, 1867, by which Benton conveyed to Darby a certain parcel of land in Great Barrington, "reserving to myself, my heirs and assigns, the spring of water on said premises, and the right to lay down, repair, and rebuild aqueduct and pipe, and convey said water off from said premises, together with the right to fix said spring and do any other act or thing necessary for taking off said water." The plaintiff's deed was dated April 9, 1869. On March 29, 1877, Jane M. Darby, by her deed, conveyed the Darby lot, subject to said reservation, to the defendant; and the defendant owned the premises subject to said reservation until June 15, 1882, when he conveyed said lot to one Shepard, and Shepard conveyed to John E. Rogers, who owned the Darby lot under said conveyance, subject to the reservation in Benton's deed, at the time of the trial. The defendant, soon after he obtained his deed of Jane M. Darby, in the spring of 1877, and while he owned the Darby lot, dug a ditch on and from the Darby lot northerly to a highway, and thence easterly to another highway, and thence northerly on said last-named highway to his dwelling-house, and laid down therein logs and carried water from the stream of water on the Darby lot to his dwelling-house. About a year after said logs were laid, the plaintiff laid a pipe joined to said logs at the junction of said highways to a place in the highway in front of his house, by an understanding between him and the defendant, and took water through said pipes to his premises for two or three years; and sometimes, when the water was low and did not run down as far as said junction, the plaintiff would go up to the Darby lot and get water from a penstock put into the defendant's logs.

At the time of Benton's deed to Jane M. Darby, and ever since, there was running from the premises situate south of and above the Darby lot a small stream of water, having its rise on land of one Comstock, about one hundred rods south of the south line of the Darby lot, which ran northerly to the Darby lot and down on said lot ten rods, more or less, sometimes disappearing and then reappearing; but it could be heard running under the



rocks and stones, and it was finally lost by running into the sandy or gravelly land, and there wholly disappeared. Said stream had never been known to be wholly dried up, and was, at its largest condition, about three inches wide, but in the summer season it would about fill an inch pipe. Whatever the defendant did with the water, he did while he was owner of the soil, or under direction of Rogers at the time when Rogers owned it.

The plaintiff contended that "the spring of water" named in the reservation in Benton's deed, and under which he claimed, meant said stream of water; and he introduced the evidence of persons who had long lived in the vicinity of the stream and known of it, that it was called a spring. To this evidence the defendant objected as being incompetent, but the judge admitted it.

The plaintiff offered evidence to prove the declarations of Henry H. Peck, now deceased, the grantor of the plaintiff, made on the Darby lot when he conveyed it to the plaintiff. The defendant objected to this evidence; but the judge allowed the witness to state that Henry H. Peck said that he intended to carry this stream of water off the Darby lot, and that he called it a spring in speaking of it. The plaintiff also called Jane M. Darby, who testified, against the defendant's objection, that there was no other water or spring on the Darby lot at the time she purchased said lot, or during the time she owned it, than this little stream of water; and that she understood, at the time she purchased, that this little stream of water was the water reserved by Benton in his deed to her. The defendant excepted to the rulings of the judge admitting this evidence, and further contended that the language in the reservation was not ambiguous, and should be interpreted and construed by the court, and not left to the jury under such evidence, or any evidence; but the judge ruled that it should be submitted to the jury.

There was other evidence, not excepted to, introduced by both parties, as to whether there was or was not a spring or springs of water on the Darby lot other than the stream; but there was no evidence that there ever was a "spring of water," commonly known as a "spring," in the line of the stream, or within ten feet of it. There was no evidence offered by the plaintiff, or in the case, that the plaintiff, or any one under whom he holds,

ever located or attempted to locate his right to take the water off the Darby lot, up to the date of the writ, or to assert any right under the reservation excepting as above stated.

The plaintiff contended that the stream was the spring named in the reservation ; that the defendant's acts, in laying his logs and conducting the water of the stream off from the Darby lot, was an infringement and interruption of his rights under his title ; and that he was entitled to nominal damages.

The judge, at the request of the plaintiff, instructed the jury as follows : " If the jury, under instructions given by the court, shall find that the reservation in the deed from Benton to Darby applied to the water supply claimed by the plaintiff, and if they shall find that the defendant, without the consent of the plaintiff, put in an aqueduct, and by means thereof diverted and took away the water or any part of said water supply from said Darby lot to other premises of the defendant, then the defendant violated the legal rights of the plaintiff, and it will be their duty to return a verdict in the plaintiff's favor, for at least nominal damages."

After the judge had concluded his charge to the jury, and not having instructed them as to the evidence of joint occupancy by the plaintiff and the defendant of the defendant's logs and the water running through them, the defendant asked the judge to instruct the jury as follows : " If the plaintiff knew of the defendant's laying his aqueduct at the time it was done, and made no objection at the time, and afterwards joined in the use of the water which ran through the same, he cannot recover in this action for such laying of the defendant's aqueduct, or its use." The judge declined to give this instruction, and instructed the jury no further after closing his charge to them.

The jury returned a verdict for the plaintiff ; and the defendant alleged exceptions.

*H. J. Dunham & A. J. Waterman*, for the defendant.

*H. C. Joyner*, for the plaintiff.

HOLMES, J. 1. If there was no spring, properly so called, on the Darby lot, it may be doubted whether the reservation of " the spring of water on said premises " in the conveyance of that lot would not be taken to refer to the stream, without evidence in favor of such an interpretation. The stream was the

outlet of a spring a short distance off on the next lot. It hardly appeared as a stream to casual observation, and it was finally lost in the ground. Nothing would have been more natural than to describe it as a spring, and it cannot be contended seriously that such a slight inaccuracy of expression is to make inoperative words clearly intended to reserve something, assumed to be well known to, or easily recognized by, the parties, as is shown by the use of the definite article, — “the spring.” The plaintiff’s evidence tended to show that there was no other spring, and evidence that this water was called a spring in the neighborhood was admissible, although possibly superfluous.

2. The evidence that Peck, the plaintiff’s grantor, now deceased, when he made his conveyance to the plaintiff, stated on the Darby lot that he intended to carry this stream off the Darby lot, and called it a spring, was admitted, we presume, as being in effect an identification of the spring attached to the land conveyed, and as falling within the principle of declarations as to boundaries. *Daggett v. Shaw*, 5 Met. 223. *Davis v. Sherman*, 7 Gray, 291. *Wood v. Foster*, 8 Allen, 24. *Long v. Colton*, 116 Mass. 414. *Hunnicut v. Peyton*, 102 U. S. 333, 364. So far as these cases stand on the ground that such declarations are acts qualifying the party’s possession, *Niles v. Patch*, 13 Gray, 254, 257, they do not apply to the identification of an easement. For, unless it be assumed that the easement identified and claimed is the one in fact attached to the dominant estate, the party making the declaration has no possession of it; and the assumption thus made to justify the admission of the evidence would be an assumption of the very fact which the evidence was admitted to prove. But it is more satisfactory perhaps to say, that the admission of such declarations has generally been regarded as an exception to the general rule against hearsay, and that we cannot extend the principle further than it has been carried by authority. We are not aware that it has ever been applied to a case like this. On this point, the exceptions must be sustained.

3. The testimony of Mrs. Darby, the original grantee subject to the reservation of the spring, that, at the time of her purchase and ownership, there was no other water or spring on the lot, was admissible, of course, as tending to show that the words

must have referred to this water. Her subsequent statement, that she understood at the time that this stream was the water reserved, seems to have been merely a statement of a conclusion from what she had already testified, and did not add to it. Whether standing alone it would have been admissible, if the suit had been against her, as an interpretation made by her against her own interest, and whether, if admissible against her, it would have been admissible against a purchaser from her without notice, are questions not fairly raised, we think, in this case.

4. The instruction to the jury was correct. It may be true that, so long as the plaintiff had not appropriated the water, he could not have sued the defendant for doing transitory acts, such as drawing water in pails or watering his cattle. But when the defendant put in an aqueduct, which diverted the water continuously, and which would interfere with the exercise of the plaintiff's rights whenever thereafter he sought to exercise them, he did an overt act of permanent effect, which amounted to a standing open denial of the plaintiff's right, and which would have extinguished it in twenty years to the extent of the water withdrawn. Nominal damages, at least, may always be recovered for such an act.

5. The ruling of the court required the jury to find that the defendant put in the aqueduct and withdrew the water without the plaintiff's consent. When the charge was finished, the defendant had no right to single out particular circumstances tending to show consent, and require the court to comment on them specially. Whether the plaintiff's making no objection to the aqueduct and afterward using water from it, if proved, would have amounted to anything more than evidence from which the jury might have inferred consent, we need not consider. The counsel for the defendant argues that the question should have been submitted to the jury, but his request was for a ruling that the supposed facts were a bar, as matter of law.

*Exceptions sustained.*

CHENEY BIGELOW WIRE WORKS *vs.* PETER SORRELL  
& another.

Berkshire. Sept. 15. — Oct. 21, 1886. DEVENS, W. ALLEN, & C. ALLEN,  
JJ., absent.

A. sent a postal card, signed by him, to B., containing the following: "Please send us pice of counter screen like draft." Upon this card was a draft of a counter screen with the measurements thereof. *Held*, in an action by B. against A. for the price of the goods named, that the writing presented a case of incurable uncertainty; and that the judge properly refused to submit it to the jury to determine whether the letters "pice" meant "piece" or "price."

MORTON, C. J. This is an action to recover the price of a "counter rail." The plaintiff put in evidence a postal card signed by the defendants, of which the substance is as follows: "Please send us pice of counter screen like draft." Upon this card was a draft of a counter screen with the measurements thereof. The court rightly ruled that this order was unmeaning and unintelligible, and that it could not be construed as an order for a piece of counter railing. It presents a case of incurable uncertainty; and the court properly refused to submit it to the jury to determine whether the letters "pice" meant "piece" or "price." These letters do not mean anything, and neither the court nor the jury can construe them as meaning "piece."

There was no valid written order; and the question whether the defendants intended to order a piece of counter rail, and, either expressly or by implication, promised to pay for it, was submitted to the jury with instructions of which the plaintiff does not complain, and which were sufficiently favorable to it.

*Plaintiff's exceptions overruled.*

*M. E. Couch*, for the plaintiff.

*S. P. Thayer*, for the defendant.

## STEPHEN D. COMINS vs. TURNER'S FALLS COMPANY.

Franklin. Sept. 21. — Oct. 21, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

The St. of 1791, c. 82, incorporated a navigation company, and authorized it to build such dams, locks, and canals as were necessary for its purposes. The St. of 1880, c. 148, which was accepted by the corporation, provided that the corporation might maintain and use its dams, locks, and canals "as at present constructed;" authorized it to construct other dams, locks, and canals for the purpose of creating a water power to use or to lease for manufacturing purposes; provided that, for those purposes, the corporation should have all the powers and privileges, and be subject to all the duties, liabilities, and restrictions, set forth in the general laws relating to manufacturing and other corporations; relieved the corporations from the obligation to support its dams, locks, and canals for the purposes of navigation; and discontinued its canals as a navigable highway. *Held*, that the corporation, by accepting the St. of 1880, waived its right to build and maintain its dam at a greater height than that of the dam when the statute was passed; and that, if it did so, a person injured thereby could maintain a complaint under the mill act, Pub. Sts. c. 190.

COMPLAINT, dated November 19, 1883, under the mill act, Pub. Sts. c. 190. Trial in the Superior Court before *Staples, J.*, who allowed a bill of exceptions, in substance as follows:

The respondent was incorporated by the St. of 1791, c. 82, as a navigation company, and was authorized to maintain dams across the Connecticut River at Turner's Falls. It built a dam soon after 1792.

The complainant is the owner of a tract of meadow land on said river, above said dam, and derived his title under three deeds: the first, dated October 22, 1851, from the respondent to one Severance; the second, dated January 1, 1853, between the same parties, each containing covenants of warranty and against incumbrances, and reserving a right of way; and the third, dated April 1, 1868, from Severance to the complainant.

The St. of 1880, c. 148, which was duly accepted by the respondent, was as follows:

"Section 1. The Turner's Falls Company may maintain and use its dams, locks, and canals, as at present constructed, or any portion thereof, and may construct other dams, locks, and canals connected therewith, for the purpose of creating a water power to use or lease to other persons or corporations for mechanical or

manufacturing purposes. And for the purposes aforesaid the said Turner's Falls Company shall have all the powers and privileges and be subject to all the duties, liabilities, and restrictions set forth in" the Gen. Sts. c. 68, "and acts in amendment thereof and in addition thereto, and" the St. of 1870, c. 224, "and the acts in amendment thereof and in addition thereto; but this grant shall in no wise impair the legal rights of any stockholder in said company.

"Section 2. The Turner's Falls Company is hereby relieved from the obligation to support its locks, dams, and canals, for the purposes of navigation, and its said canal is hereby discontinued as a navigable highway.

"Section 3. This act shall not take effect until it is accepted by a majority in interest of the stockholders present or lawfully represented and voting at a legal meeting called for that purpose."

The waters of the dam have been used exclusively for mechanical and manufacturing purposes since 1866. The dam, canal, and locks have not been used for navigation purposes since 1854.

The complainant offered evidence tending to show that his land mentioned in the complaint had been flowed by water since the latter part of 1881, and in the year 1882, to a higher point than before those dates since the spring of 1867, doing injury thereto; and that the dam, as raised by the respondent as hereinafter stated, caused said flowage.

It further appeared in evidence, that the respondent, commencing in August, 1880, and finishing the work in August or September, 1882, raised seven inches in its effective height the dam which had been erected in 1866 and 1867, and which had from that time been maintained at the same height down to the time of the raising aforesaid; that the respondent had maintained a dam across the Connecticut River for about ninety years; that the dam erected by the respondent in 1866 and 1867 was near, but not on the exact site of, the former one; and that the former dam, at the time the erection of the new one in 1866 and 1867 was commenced, was out of repair and uneven upon the top, and had not been much used since 1854.

The respondent offered evidence tending to show that the dam built in 1866 and 1867 was constructed at a lesser height than

was the former dam; and that the dam of 1866 and 1867, as it existed at the date of filing the complaint, and since that time, was not, in its effective height, higher than the former dam, if it was as high.

The respondent admitted that the dam, at the date of filing the complaint and ever since, was higher in its effective height than said dam of 1866 and 1867; and that, by reason of the raising thereof, the land of the complainant had been flowed more than it was subsequently to 1867, and prior to 1881 and 1882.

The judge ruled, that, if the dam, as built and maintained in and after 1866 and 1867, was effectively raised by the respondent in 1881 and 1882, and thereby flowed the complainant's land, doing damage, it presented a case under the mill act; and excluded the evidence offered by the respondent, as not tending to show a substantive defence to the complaint.

The jury found for the complainant; and also found specially that the effective height of the dam, as built in 1866 and 1867, and maintained in 1880, was increased by the respondent seven inches in the year 1882.

The respondent alleged exceptions.

*A. De Wolf*, for the respondent.

*C. C. Conant & S. D. Conant*, for the complainant.

MORTON, C. J. The purpose of the Legislature, in passing the St. of 1880, c. 148, was to change the Turner's Falls Company from a navigation company into a manufacturing company, to authorize it to maintain its dams at the height existing at the time the act was passed, and, as to all future operations of the company, to put it upon the same footing with the other manufacturing companies of the State.

The court accordingly held, at the former hearing of this case, that if the complainant was injured by the raising of the respondent's dam after the act was passed and accepted by the corporation, his remedy was by an application to the Superior Court under the mill act. *Comins v. Turner's Falls Co.* 138 Mass. 222.

The contention of the respondent, that it has a perpetual right to maintain a dam at the height of the old dam erected under its original charter, is inconsistent with the purpose and spirit of



the St. of 1880. The statute relieved the company from its obligations as a navigation company, and definitely fixed the height at which it could maintain its dam for manufacturing purposes, and made it for the future subject to all the duties and liabilities of manufacturing companies under our laws. The only reasonable implication is, that, if it raises its dam beyond the height then established, it shall, like other manufacturing companies, be liable to respond in damages to a party injured, upon a complaint in the Superior Court under the mill act. By accepting the act, the company waived and abandoned its right under its old charter to build and maintain a dam at a greater height, without compensation to parties injured thereby. The ruling of the Superior Court, therefore, was correct.

The respondent now contends that, as the complainant derives his title from one Severance, to whom the company conveyed in 1851 and 1853, the complainant now "holds the land subject to such rights of flowage as existed at the time of the sale of the land by the respondent." The deeds to Severance were deeds in which the company warrants against all incumbrances, and reserves a right of way. The bill of exceptions does not state any of the circumstances of the sale or the condition of the land, or the extent to which it was flowed. Upon the facts stated in this bill of exceptions, we can see no ground upon which it can be held that there was an implied reservation to flow the land by a dam as high as the former dam. But we do not discuss it, because it does not appear that any question as to the construction and effect of these deeds was raised at the trial.

*Exceptions overruled.*

DIANTHA M. HALL vs. GEORGE H. HARTWELL & trustees.

Hampshire. Sept. 21.—Oct. 21, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

In a trustee process, where there are successive services of the writ upon the trustee, under the Pub. Sts. c. 183, § 8, and the action is on a demand for necessities, the trustee is entitled, under § 30, to reserve from the amount due the defendant for personal labor the sum of ten dollars at the time of each service.

**TRUSTEE PROCESS.** E. C. Lyman and C. E. Shipman, co-partners under the firm name of Lyman and Shipman, were summoned as trustees of the principal defendant. The officer's return upon the writ stated that he made four successive services upon the trustees, on August 1, 8, 15, and 22, respectively. The trustees' answer alleged that, at the time of each service upon them, they had not in their hands or possession any goods, effects, or credits of the defendant except the sum of eight dollars, due the defendant for personal labor and services, which sum, being exempt from attachment, was paid to the defendant. The plaintiff alleged that the action was upon a demand for necessities; and moved that the trustees be charged upon their answer.

The Superior Court discharged the trustees; and the plaintiff appealed to this court.

*C. G. Delano*, for the plaintiff.

*H. P. Field*, for the trustees.

C. ALLEN, J. The plaintiff contends that, although the writ was served upon the trustees several times, the various services constituted but one attachment; and that, when the second and all later services were made, the trustees were bound to bear in mind that they had already reserved and paid over eight dollars to the principal defendant, and that they were only entitled to reserve and pay over ten dollars in all. Pub. Sts. c. 183, §§ 8, 30. But we think the statutes should receive a broader construction. The intention was, to enable persons whose earnings are small and often payable to receive the whole of them, without the risk of their being intercepted by the trustee process. Otherwise, a diligent creditor, by making numerous successive services, could reach and appropriate a large portion of the earnings of persons

who might be dependent upon the immediate product of their labor for the necessary support of themselves and their families. If the defendant had worked at the rate of eight dollars a week for four different persons in succession, a week for each, it would hardly be contended that the plaintiff, by summoning each of them as trustee as soon as his indebtedness to the defendant accrued, could hold the surplus of their united indebtedness to him, after reserving ten dollars. The defendant should not be any worse off because he continued in the employ of the same firm. It is more conformable to the obvious intention and policy of the statutes to hold that ten dollars shall be reserved at the time of each service. And such construction is in accordance with the spirit of the cases cited by the trustees.\*

*Trustees discharged.*



**MADIELIA E. HAYDEN vs. WILLIAM M. HAYDEN & trustees.**

Hampshire. Sept. 21. — Oct. 21, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

A corporation was authorized by will to lend money from the income of a fund, to the amount of \$500, for a term not over five years, to each of certain apprentices, on his furnishing security for the repayment of the same, at the expiration of the term, with interest annually. The will further provided, that, if the interest were paid punctually, and in a certain other event, the obligation should be cancelled. The corporation deposited the sum of \$500 in a savings bank in the name of an apprentice, but payable to the corporation, as collateral security for the promissory note of the apprentice, by which he promised to pay the corporation \$500 in five years from date, or on demand, at the option of the trustees of the corporation, with interest annually. Three days before the five years from the date of the note expired, the trustees "voted to surrender" the note of the apprentice. On the same day, and before anything further had been done, an action was brought against the apprentice by a third person, and the savings bank and the corporation were summoned as trustees. *Held*, that they were entitled to be discharged.

**TRUSTEE PROCESS.** Writ dated June 24, 1884, and served on the Northampton Institution for Savings and the Trustees of the Smith Charities, summoned as trustees, on the same day.

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\* *Carr v. Fairbanks*, 28 Vt. 806. *Collins v. Chase*, 71 Maine, 434. *Bliss v. Smith*, 78 Ill. 359.

It appeared, from the answer of the Northampton Institution for Savings, that, on July 2, 1879, it received a deposit of \$500 from the clerk of the Trustees of the Smith Charities; that a book was issued therefor entitled "Wm. M. Hayden, payable to the order of the Smith Charities;" that interest was paid to said clerk as follows: on March 26, 1884, \$50.25, and on June 6, 1884, \$25; and that the officers of the institution were unable to say whether the deposit was made directly or indirectly for the benefit of the defendant.

The answer of the Trustees of the Smith Charities, filed on October 30, 1884, was as follows:

"And now the Trustees of the Smith Charities, summoned as trustees of the defendant in the above action, come, and for answer say that at the time of the service of the writ upon them they had not in their hands or possession any goods, effects, or credits of the defendant. And of this they submit themselves to an examination upon oath.

"And further answering, these Trustees say that they are incorporated under the laws of this Commonwealth to carry into effect the provisions of the last will and testament of Oliver Smith, Esquire, deceased; that by the provisions of said will material to this case, a sum of money, to wit, the sum of five hundred dollars, was lent by the Trustees of said Smith Charities to the principal defendant, and that to secure the payment of said sum with interest, said defendant gave said Trustees his promissory note, and deposited in the Northampton Institution for Savings the sum of five hundred dollars as collateral security for said note; that the principal defendant, having complied with the provisions of said will, the Trustees of the Smith Charities, in pursuance of the provisions of said will, voted to cancel and give up said note to said principal defendant; that this vote was passed by them before the service of the writ upon them in this action.

"Wherefore they say that at the time of the service of said writ upon them they had not in their hands and possession any goods, effects, or credits of the defendant.

"Wherefore they pray that they may be discharged."

In answer to the interrogatory, filed by the plaintiff, "Do you now claim any right, title, or interest in said five hundred

dollars, now in the hands and possession of said Northampton Institution for Savings?" the following answer was made:

"The note given the Trustees of Smith Charities has never been surrendered to said William M. Hayden; if the vote and record of said Trustees of Smith Charities, as set forth in their answer filed October 30, 1884, and hereto annexed, without any surrender of the note to the principal maker, is such an act as releases all our claim to said money or on said note, then we do not claim any interest in said money, except as we may hold it for said William M. Hayden, or as trustees in this suit. A printed copy of said will is hereto annexed. We also annex a copy of said order of Trustees of Smith Charities, and a copy of said note and indorsements. Said Trustees of Smith Charities further state, upon a more careful examination of said note and indorsements, that there is still due on said apprentice note six and  $\frac{4}{10}$  dollars, as interest from April 1, 1884, to June 27, 1884."

The copy of the vote and record annexed was as follows:

"June 24, 1884. Voted to surrender the apprentice notes of Lewis A. Day and William M. Hayden, Charles H. Waite and Orson P. Smith, they having paid the interest punctually, and the Trustees being satisfied that they will make good use of the money in the future."

The copy of the note was as follows:

"\$500. Northampton, June 27, 1879.

Value received, I, William M. Hayden of Deerfield, promise to pay to the Trustees of the Smith Charities, or their order, five hundred dollars, in five years from date, or on demand, at the option of said Trustees, at any time within said five years, with interest annually. William M. Hayden."

The indorsements on the note showed that interest on the same had been received as follows: July 22, 1880, \$30; March 8, 1882, \$30; March 26, 1884, \$50.25, interest to April 1, 1883; June 6, 1884, \$25, interest to April 1, 1884.

Annexed to the answers of the trustee was a copy of the will of Oliver Smith. So much of the will as relates to the question in this case is thus stated by Chief Justice Bigelow, in *Smith Charities v. Northampton*, 10 Allen, 498, 500: "By a clause in the testator's will, he made provision for the selection of certain

boys by the trustees, to be bound out as apprentices on certain terms and conditions by him specified, until their arrival at the age of twenty-one years, and in relation to the boys thus selected and bound out he made this further provision: 'Each of said boys who shall have been bound out as aforesaid, and who shall apply therefor at any time within six years after his arriving at the age of twenty-one, and who shall have conducted himself well and faithfully during his apprenticeship, and also until the time of such application, shall, at the discretion of said trustees, receive a loan of money from the income of this fund, not exceeding five hundred dollars, for a term not over five years, on his furnishing good and satisfactory security for the repayment of the same at the expiration of said term, with the interest thereon annually. And if at the end of the said term the interest shall have been punctually paid, and the conduct of the borrower shall have been such as to satisfy the said trustees that he will in future make a good use of the money, the obligation shall be cancelled and given up without the payment of any further sum than the interest aforesaid.'"

In answer to further interrogatories, the trustee answered, that, at the time of the deposit, it was understood that interest was to be paid thereon; that interest was received from the savings institution and applied to the payment of interest on the note; and that, at the time of the service of the writ in this case, there was due from the savings institution, as interest on the deposit, the sum of \$27.19.

At the hearing in the Superior Court, before *Staples, J.*, both trustees were discharged; and the plaintiff alleged exceptions.

*J. B. O'Donnell*, for the plaintiff.

*T. G. Spaulding*, for Northampton Institution for Savings.

*D. W. Bond*, for Trustees of Smith Charities.

*C. ALLEN, J.* The plaintiff relies on the vote of the Trustees of the Smith Charities passed on June 24, 1884, as creating an obligation to the principal defendant, of which he might avail himself. The question arises out of the somewhat peculiar method adopted by the Trustees of administering their trust, in respect to the loan to the defendant. Instead of lending the money for a fixed term, not over five years, during which the beneficiary would know that he could have the use of it,

the Trustees took from him a note payable in five years, or on demand, at their own option; and instead of making a loan, of which, during its continuance, the beneficiary could make a beneficial use, the whole amount of the money lent was held in the savings bank as collateral security for its repayment, yielding a lower rate of interest than the beneficiary was required to pay to the Trustees. Thus, the loan, instead of being a benefit to him, would be a burden, unless at its maturity the Trustees should see fit to cancel and give up his note. If the note had been made payable at the end of five years, without the further provision making it payable on demand at the option of the Trustees, it is quite plain that they would have no authority to cancel or give it up before the end of the five years. This is fully covered by the decision in *Smith Charities v. Northampton*, 10 Allen, 498. In that case, the Trustees sought the instructions of this court as to their duty and power in respect to loans made by them under the same clause of the will which authorized a loan to the present defendant, in cases where the borrowers died before the expiration of the terms for which the loans were made, and it was then assumed, both by the Trustees in seeking instructions, and by the court in expounding the will, that in the execution of their trust the Trustees would, as a matter of course, make loans only for fixed terms. It is not necessary for us, in the present case, to make a final determination of the question whether the Trustees had any authority to make a loan upon the terms contained in the note taken from the defendant, or whether, assuming that they had such authority, they could cancel and give up the note before the expiration of the five years, without at least first making a formal demand for its payment; because even if, merely for the sake of the argument, such power were to be conceded, we are of opinion that, upon the facts stated, the Trustees by their vote of June 24 did not intend to make a present gift of the money to the defendant, and that, if they did so intend, they did not do enough to make a completed gift to him. Construed in the light of all the facts disclosed, and especially in the light of their power and duty under the will, as heretofore explained to them by this court, their vote does not import an intention to surrender the note at once, or before the expiration of the five years, so as to give

to the defendant a present absolute right to its surrender, and to a transfer to himself of the money held by the savings bank. There is nothing but the mere language of the vote itself which goes to show such intention. That language does not necessarily lead to that inference. It is consistent with an intention to give up the note at the end of the five years, which term would expire three days later; and the circumstances disclosed lead us to suppose that such was, in point of fact, their intention.

But whatever their intention at the time, the mere vote would not, of itself alone, amount to a gift of the money to the defendant. There was no previous understanding that such a vote should be passed. The defendant knew nothing of it. Nothing was done in pursuance of it, prior to the commencement of the plaintiff's action. The plaintiff appears to have obtained early information, in some way not disclosed, of the vote, and to have taken prompt action, with a view to availing herself of it. The vote, however, was merely a voluntary act, to which the defendant was in no way a party or privy, and no surrender or transfer was made to him or to any person in his behalf. In order to give to him a present absolute right to the money, there must have been, not only an intention to make a present gift of it to him, but enough must have been done in execution of such intention to make the gift complete. *Scott v. Berkshire County Savings Bank*, 140 Mass. 157, 166. *Sherman v. New Bedford Savings Bank*, 138 Mass. 581. *Idé v. Pierce*, 134 Mass. 260. *Gerrish v. New Bedford Institution for Savings*, 128 Mass. 159. *Cummings v. Bramhall*, 120 Mass. 552, 564. *Shurtleff v. Francis*, 118 Mass. 154. *Clark v. Clark*, 108 Mass. 522. *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228.

*Exceptions overruled.*



## COMMONWEALTH vs. PATRICK HALL.

Hampshire. Sept. 21. — Oct. 21, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

A conviction for a simple assault may be had on an indictment which charges in one count a riot and an assault committed riotously.

INDICTMENT alleging that the defendant, on September 12, 1885, "together with divers other evil-disposed persons to the number of five and more, whose names are to the said jurors unknown, at Northampton . . . unlawfully, riotously, and routously did assemble and gather together, to the disturbance of the public peace, and being so then and there assembled and gathered together, in and upon one Mary Detter, then and there unlawfully, riotously, and routously did make an assault, and the said Mary Detter then and there unlawfully, riotously, and routously did beat, wound, and ill treat, and other wounds to the said Mary Detter then and there unlawfully, riotously, and routously did, against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided."

Trial in the Superior Court, before *Staples, J.*, who allowed a bill of exceptions, in substance as follows:

The evidence for the government tended to show that, late in the night of the day alleged in the indictment, the defendant and five other young men drove to the house of Mary Detter, a widow, in Northampton. The woman and all her family, consisting of several children, had retired. She heard a loud knock at the front door, and inquired who was there, and what was wanted. The defendant said, "An officer. Does Lafayette Welsh live here?" Being told by her, "No, he lives across the street," one of the men replied, "He lives here. Open the door, if you don't, I'll break it in." Mrs. Detter then opened the door, and the defendant with two others went in, one of them shutting the door and locking it. The defendant then took a lighted lamp which Mrs. Detter had brought into the hall when she came to the door, and searched the premises, disturbing nothing in the rooms entered, and accompanied by Mrs. Detter, the rest standing at the door. There was some conversation, in which the rest

joined ; and then one offered a bottle and asked Mrs. Detter to drink, which she refused. The defendant put his arm around her neck, and, taking hold of two rings which she wore, asked her for them, and tried to get them off. She told him to keep his hands away from her. Upon being threatened by her, he did not persist in further familiarity, and took his arm away from her person. None of the others had any part in this act, and did nothing to incite the defendant to it, nor to show their approval of it. There was no other act of disorder or violence done by any of those present, and they soon after drove away.

The evidence for the defendant tended to contradict that introduced by the government.

The defendant, among other requests for instructions which were granted, asked the judge to instruct the jury as follows : "1. In order to convict, it must be shown that the defendant and others, to the number of three or more, entered the house of the person upon whom the assault is alleged to have been made, in pursuance of a common resolution and purpose to commit the same, and that, while there, they all participated and acted in concert in the commission thereof. 2. If the jury are satisfied that no one but the defendant touched the person of Mrs. Detter, the mere presence of the others, without actually taking any part or helping or inciting by their words or acts, would not render them jointly liable upon so much of the indictment as relates to the assault, and the defendant must be acquitted. 3. Any and all of the acts alleged in the indictment as constituting an offence for which the defendant can be convicted must be the joint acts of three or more persons, with such circumstances of actual force or violence, or of an apparent tendency thereto, as are naturally apt to strike terror into people, the public, or the neighborhood, and cannot be confined to acts of such a character done in relation to the inmates of a private house only."

The judge refused to give these instructions ; and instructed the jury that they could convict the defendant of an assault, or of an assault and battery, if they believed the evidence of the Commonwealth, although it was committed by the defendant alone, and was not committed riotously or routously, as charged in the indictment.

The jury found the defendant guilty of an assault only; and he alleged exceptions.

*C. G. Delano*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

C. ALLEN, J. The general rule is familiar, that a defendant in an indictment may be convicted of any offence which is well charged therein, and is proved, although the whole charge contained in the indictment is not proved. But the defendant contends that the present case falls within an exception to the rule, and that no conviction for assault and battery only can be had on an indictment which charges, in one count, a riot and an assault and battery committed riotously. The decision in *Rex v. Heape*, 2 Salk. 593, *S. C. nom. Rex v. Sudbury*, 1 Ld. Raym. 484, is chiefly relied on to support this view; and it certainly has been often considered by text-writers as going to this extent, though, on examination, it will be seen that it does not necessarily do so. The indictment in that case charged several with riot and a riotous assault, and the jury found a general verdict of guilty against two, and acquitted the rest. On a motion in arrest of judgment, it was considered clear that the two defendants who were convicted could not be held guilty of a riot, since the others were acquitted, and two persons are not enough to make a riot; and being thus, in contemplation of law, discharged of the riot, it was held that no judgment upon the general verdict of the jury could be entered against them for the assault and battery. No special verdict of guilty of the assault and battery was returned, and the question did not arise whether such a special verdict could have been sustained.

In principle, there is no good reason for taking this case out of the general rule, more than other cases where there is a charge of assault and battery, with circumstances of aggravation which the evidence fails to prove. The whole current of modern decisions is opposed to establishing such an exception; and the decision in *Shouse v. Commonwealth*, 5 Barr, 83, cited with approbation in *Dinke v. Commonwealth*, 17 Penn. St. 126, is directly in point. See 1 Bennett & Heard's Lead. Cas. 551-554; 2 Ib. 38.

*Exceptions overruled.*

## COMMONWEALTH vs. FRANK E. STEVENS.

Hampden. Sept. 28. — Oct. 21, 1886. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint for an unlawful sale of intoxicating liquor to A., he testified for the government that he bought one half-pint of whiskey of the defendant, paying a certain sum therefor; and he produced a small bottle of fluid, which he said was the same whiskey which he bought of the defendant, in the bottle in which it was delivered. *Held*, that the bottle was properly admitted in evidence.

If, at the time of taking an appeal to the Superior Court in a criminal case, a statute has been enacted and approved, but has not taken effect, providing for a new term of the Superior Court, to be held at an earlier day than the term then provided for by law, an appeal to such new term is not a ground for an arrest of judgment in the Superior Court.

COMPLAINT to the District Court of Eastern Hampden, for an unlawful sale of intoxicating liquor to one Pease, on May 27, 1885, at Monson. The record showed that the district court heard the complaint on June 26, 1885, adjudged the defendant guilty, and sentenced him; from which sentence he appealed "to the Superior Court, next to be holden at said Springfield, within and for the county of Hampden, on the fourth Monday of September next." Trial in the Superior Court, before *Knowlton, J.*, who allowed a bill of exceptions, in substance as follows:

Pease was called as a witness for the government, and testified that, on May 27, 1885, he bought one half-pint of whiskey of the defendant, paying therefor the sum of twenty-five cents. At the request of the district attorney, the witness produced a small bottle of fluid, which he said was the same whiskey which he bought of the defendant, in the bottle in which it was delivered; and it was admitted in evidence, against the objection of the defendant. It did not appear where said bottle of whiskey had been kept since said May 27. Pease also testified that he was hired and paid to buy said liquor, in order subsequently to testify thereto to convict the defendant, if possible; that he and one Alberty were together engaged in the business of "spotting" alleged liquor sellers in Monson; and that Alberty was present at the time said liquor was bought. Alberty testified substantially as did Pease upon all matters material herein.

The district attorney, in his argument to the jury, used the following language: "Where did Pease get that bottle of liquor? Now there is the bottle of liquor that Pease got there, and we have brought it here for you to see and try. There the liquor is; now where did he get it?" The bottle with its contents was sent out with the jury, who returned a verdict of guilty.

After verdict, the defendant filed a motion in arrest of judgment, "for the reason that upon the record of said case it is not now and never has been properly in said court, and that the court has no jurisdiction thereof." This motion was overruled; and the defendant alleged exceptions.

*E. H. Lathrop & C. L. Gardner*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

MORTON, C. J. The small bottle of whiskey produced by the witness Pease was properly admitted in evidence, it being identified as the whiskey which he bought of the defendant.

The motion in arrest of judgment was properly overruled. A person convicted of an offence before a district court has the right to appeal to "the Superior Court then next to be held in the same county." Pub. Sts. c. 155, § 58. The St. of 1885, c. 27, provides that "there shall be holden at Springfield, within and for the county of Hampden, an additional term of the Superior Court for criminal business; and hereafter terms of said court for criminal business shall be held at said Springfield on the first Monday of May, the fourth Monday of September, and the third Monday of December." The statute took effect on the first day of July, 1885.

Although this statute had not gone into effect at the time the defendant was sentenced, it had been enacted by the Legislature and approved by the Governor, and it established a term of the Superior Court which must certainly be held on the fourth Monday of September. The court properly took judicial notice of the establishment of this additional term. It was the only term to which the defendant could appeal, being the term "then next to be held in the same county," and the appeal was properly entered at that term.

*Exceptions overruled.*

## COMMONWEALTH vs. SAMUEL H. WOOD.

SAME vs. SAME.

SAME vs. SAME.

Worcester. October 4. — 21, 1886. DEVENS &amp; W. ALLEN, JJ., absent.

An indictment for obtaining money by false pretences alleged that the defendant, at a time and place named, falsely represented to A. that the defendant was treasurer and secretary of a corporation established in another State; that the capital stock of the corporation was \$400,000; that \$200,000 worth of said stock had been subscribed for and paid in in cash, which was chiefly invested in real estate where the corporation was located; that the stock was worth, and was selling for, a certain sum per share, at said place; and that the defendant, on a later day named, by a letter written by him and received by A. on said day, falsely represented that the amount of capital stock subscribed for, paid in, and invested as aforesaid was \$192,000, instead of \$200,000, as previously stated by the defendant. At the trial, the government introduced evidence tending to prove the oral statements alleged to have been made by the defendant; and, to prove the modification of these statements alleged to have been made subsequently by letter, introduced a letter written by the defendant to A., the material part of which was as follows: "The issue of additional stock in the" corporation "will not be made till" a day named, "as we want to dispose of about \$8000 more stock; we have sold \$192,000 and want to make it \$200,000, then one half of the capital stock will have been issued. About two thirds of this stock has been taken by old stockholders at par, but part of the stock has sold as high as" a certain sum "per share. The new stock does not receive any dividend until" a day named. The judge refused to rule, as requested by the defendant, that there was no evidence to prove the representation as alleged in the indictment, or that there was a variance between the allegation and the proof as to the letter; and instructed the jury, that, if they should find that the statement in the letter was a correction of the oral statement previously made as to the amount of stock issued, then stated to be \$200,000, they would be authorized to convict the defendant, and that the meaning of the letter was for them, but, if it related to a new issue of stock, they must acquit. *Held*, that the defendant had no ground of exception.

Under an indictment for obtaining money by false pretences, a conviction may be had for falsely representing that the stock of a corporation was selling at a certain price, but not for falsely representing that it was worth a certain price.

An indictment alleging that, by reason of false representations made by the defendant to A., as to the stock of a corporation, A. was induced to deliver to the defendant, at a certain town in this Commonwealth, a cashier's draft for the payment of a sum named, is supported by proof that A. sent the draft to the defendant in another State, being directed so to do by a note written by the defendant and left at A.'s place of business in this Commonwealth, whether A. sent the draft from this Commonwealth by the hand of an agent of the defendant, or deposited it in the mail.

An indictment alleged that A., induced by certain false pretences made by the defendant, (which were set forth,) delivered to the defendant a certain sum of

money, in exchange and in payment for a certain number of shares of stock. A bill of exceptions, alleged by the defendant and allowed by the presiding judge, which purported to set out all the evidence material to the questions raised, stated that there was evidence tending to show that A. was induced to send a check, "a copy of which is inserted in said indictment," to the defendant. No copy of a check was inserted in the indictment. *Held*, that a ruling, requested by the defendant, that the evidence would not warrant a conviction, should have been given.

MORTON, C. J. Three cases against the defendant for obtaining money by false pretences were tried together in the Superior Court, and come before us on a single bill of exceptions. It will be convenient to consider the cases separately.

In the first case, the indictment charges that the defendant, at Berlin, in the county of Worcester, on February 5, 1884, falsely represented to John G. Peters that he, said Wood, was treasurer and secretary of the Western Real Estate and Improvement Company, a corporation established at Minneapolis, in the State of Minnesota; that the capital stock of said company was \$500,000; that \$200,000 worth of said stock had been subscribed for and paid in in cash, which was chiefly invested in real estate in Minneapolis; that the stock was worth, and was selling for, from \$55 to \$60 per share, at said Minneapolis; and that the defendant, on April 25 following, by a letter written by him and received by said Peters, at Berlin, on said April 25, falsely represented that the amount of capital stock subscribed for, paid in, and invested as aforesaid, was \$192,000, instead of \$200,000, as previously stated by the defendant.

The government introduced evidence tending to prove the oral statements alleged to have been made at Berlin; and, to prove the modification of these statements alleged to have been made by the letter received on April 25, introduced a letter of the defendant, which we infer was dated April 20, 1884, the material parts of which are as follows: "The issue of additional stock in the W. R. & Imp. Co. will not be made till May 1st, as we want to dispose of about \$8000 more stock; we have sold \$192,000 and want to make it \$200,000, then one half of the capital stock will have been issued. About two thirds of this stock has been taken by old stockholders at par, but part of the stock has sold as high as \$52 per share. The new stock does not receive any dividend until January 1st next." This letter,

construed in connection with the previous oral statements of the defendant, substantially states that \$192,000 of the capital stock had been paid in. It would naturally be understood as intended to state that the amount of capital stock paid in was \$192,000, and directly tended to support the allegations of the indictment. The court, therefore, properly refused to rule, as requested by the defendant, that there was no evidence to prove the representation as alleged in the indictment; or that there was a variance between the allegation and the proof as to this letter. The instruction given by the court upon this subject was sufficiently favorable to the defendant.\*

The defendant also asked the court to rule, "that the representation that the stock was worth and selling for from \$55 to \$60 per share, was not such a representation as the defendant could be convicted for making." The court rightly ruled, "that the defendant could not be convicted for making the representation that the stock was worth from \$55 to \$60 per share, but could for the representation that it was selling from \$55 to \$60 per share." The last-named representation is not a statement of opinion as to the value of the stock. It is a statement of a material fact, of which Peters had no knowledge or means of knowledge, and upon which he had the right to rely. *Manning v. Albee*, 11 Allen, 520.

In the second case, the indictment charges that the same representations alleged in the first case, except that made by the letter received on April 25, 1884, were made to John G. Peters, at Berlin, on February 5, 1884; and that said Peters was thereby induced to, and did, on February 15, 1884, deliver to the defendant, at said Berlin, a cashier's draft or order for the payment of \$4612.50.

The ruling that the defendant might be convicted for making the false representation that the stock was selling for from \$55 to \$60 was right, for the reasons we have stated above.

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\* The judge instructed the jury, that, if they should find that the statement in the letter of April was a correction of the statement made in February in the matter of the amount of stock issued, then stated to be \$200,000, they would be authorized to convict the defendant, and that the meaning of the letter was for them; but, if it related to a new issue of stock, they must acquit.



The defendant asked the court to rule that, upon the evidence, "the offence was not complete in this Commonwealth, and, even if complete, the defendant could not be convicted in this county;" which ruling the court refused. It appears by the bill of exceptions that "the government introduced evidence tending to prove the representations alleged at Berlin, and that they were false, and known to be so by the defendant, and also that the purpose of the defendant in making them was as alleged in the indictment; and that, in consequence thereof, Peters was induced to send a cashier's draft for the amount named, of which a copy is inserted in the indictment, to the defendant at New York, being directed so to do by a note written by the defendant, and left at Peters's place of business in Boston."

Although the defendant received the money on the cashier's draft in New York or in Minneapolis, it cannot be doubted that the offence charged in the indictment was accomplished and completed at Berlin when Peters, at the request of the defendant, sent him the draft, whether he sent it by the hand of an agent of the defendant, or deposited it in the mail. The exceptions do not show how he sent it. But, if he sent it by a carrier or other agent of the defendant, the delivery to the agent was a delivery to the defendant. *Commonwealth v. Taylor*, 105 Mass. 172.

So, if he sent it by mail, when he deposited it in the post-office, it passed out of his control into the control of the defendant, and the postmaster was the agent of the defendant to forward the letter to him. *Regina v. Jones*, 4 Cox C. C. 198.

We are not called upon to consider whether, if the letter had been mailed in Boston, it would change the venue to Suffolk county. No such question is raised by the bill of exceptions, as there is nothing to indicate that it was mailed in Boston.

In the last case, the indictment charges the defendant with obtaining money of Luther Peters by means of false representations, the same as those alleged in the first case. The bill of exceptions purports to set out all the evidence material to the questions raised. The indictment alleges that said Luther, induced by said false pretences, on July 25, at Berlin, delivered to the defendant the sum of \$566.50, in exchange for, and in payment of, eleven shares of stock sold him by the defendant.

The bill of exceptions sets out that there was evidence tending to show "that Luther was induced to send a check, a copy of which is inserted in said indictment, to the defendant at Minneapolis." We do not know what this means, as there is no copy of a check inserted in the indictment. Taking the exceptions as they stand, we think that the ruling requested, that the evidence would not warrant a conviction, should have been given.

It is quite probable that an error in the bill of exceptions was caused by the attempt to embrace three cases in one bill, but we must take the bill of exceptions as allowed by the presiding justice; and, as there does not appear to have been any evidence to support the allegation that Luther paid the defendant the sum alleged, the exceptions must be sustained.

The result is, that, in the last case, the exceptions are sustained; and, in the others, the exceptions are *Overruled*.

Defendant, *pro se*.

*E. J. Sherman*, Attorney General, for the Commonwealth.



### COMMONWEALTH vs. WILLIAM B. BRIANT.

Worcester. October 4. — 21, 1886. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint for unlawfully selling intoxicating liquors to a minor, it is error to rule that a sale of such liquors by a servant in his master's shop, and in the regular course of his master's lawful business, is *prima facie* a sale by the master, although the sale is an illegal sale.

HOLMES, J. This is a complaint for unlawfully selling intoxicating liquors to a minor. The court assumed that the case was governed by *Commonwealth v. Wachendorf*, 141 Mass. 270; and instructed the jury that a sale by the defendant's bartender might be explained by showing that it was not authorized by the master, or was done in violation of his orders and against his will.

On the question of authority, the defendant asked for a ruling, that "agency for any other purpose will not warrant a

presumption or inference of agency illegally to sell liquor." The court refused the ruling; and instructed the jury, in substance, that a sale of intoxicating liquors by a bar-tender in his master's shop, and in the regular course of his master's lawful business, is *prima facie* a sale by the master, although the sale is an illegal sale, but that such a sale may be explained by showing that it was not authorized. Even if the ruling requested was wrong, we think the instruction given went too far in an opposite direction. For, although we should admit that a jury might be warranted in inferring that such a sale was authorized, it would not follow that a court could rule that there is a presumption of fact that it was so, which is the purport of the instruction fairly construed. The proposition that there is evidence for the jury to consider, is not identical with the proposition that the evidence, if believed, raises a presumption of fact. The proposition that there is evidence to be considered imports that there may be a presumption of fact. But generally it must be left to the jury to say whether there is one, and in many cases that is the main question which they have to decide.

The facts that a man employs a servant to conduct a business expressly authorized by statute, and that the servant makes the unlawful sale in the course of it, do not necessarily overcome the presumption of innocence merely because the business is liquor selling, and may be carried beyond the statutory limits. See *Commonwealth v. Putnam*, 4 Gray, 16; *Commonwealth v. Dunbar*, 9 Gray, 298.

It is true that a master would be liable civilly for such a sale as supposed in the instruction, but his civil liability exists even when he prohibited the sale, and therefore it does not stand upon a presumption that he authorized the sale, but upon the general ground for a master's liability for the unauthorized torts of his servants, whatever that may be. *George v. Gobey*, 128 Mass. 289. *Roberge v. Burnham*, 124 Mass. 277. Pub. Sts. c. 100, § 24. See *Byington v. Simpson*, 134 Mass. 169, 170.

*Commonwealth v. Holmes*, 119 Mass. 195, cited for the prosecution, went no farther than to decide that evidence that the defendant's son and clerk sold intoxicating liquors in a public house kept by the defendant was evidence of a sale by the defendant, sufficient to be submitted to a jury. See also

*Commonwealth v. Edds*, 14 Gray, 406. Nothing was said as to a presumption of fact. The evidence, too, was stronger than in the case at bar; for there the defendant set up no license, any sale was unlawful, and the question was whether the defendant gave authority to his clerk to sell at all. It might well be thought that the clerk would hardly undertake to sell in the way of business in his employer's house without some authority. But it is obviously much more likely that a servant employed to make lawful sales should occasionally go beyond his authority, which he might do by mistaking a minor for an adult, than that he should go into a wholly unauthorized business.

*Commonwealth v. Nichols*, 10 Met. 259, probably suggested the ruling of the court, and is perhaps a little nearer the case at bar than *Commonwealth v. Holmes*, as the defendant seems to have sold liquors at wholesale, and to have employed his clerk in that business, although not licensed to sell at retail. The court, in sustaining the defendant's exceptions, said that a sale at retail by the clerk was "only *prima facie* evidence" of a sale by the master. It hardly said, and could not have decided, that such a sale was *prima facie* a sale by the master, or that it raised a presumption of fact. Moreover, if it were held that there was such a presumption of fact in cases like *Commonwealth v. Holmes* and *Commonwealth v. Nichols*, it would not follow that there was the same presumption in the present case, still less that it was so plain that the jury could be instructed to act on it. Such presumptions are questions of fact and of degree.

*Exceptions sustained.*

*J. R. Thayer*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

## COMMONWEALTH vs. JAMES STEVENSON.

Worcester. October 4. — 21, 1886. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint for unlawfully selling intoxicating liquors to a minor, it is error to rule that a sale of such liquors by a servant in his master's shop, and in the regular course of his master's lawful business, is *prima facie* a sale by the master, although the sale is an illegal sale.

At the trial of a complaint for unlawfully selling intoxicating liquors to a minor, the person to whom the sale was made may testify that he was twenty years and eight months old at the time of the sale.

COMPLAINT for unlawfully selling intoxicating liquors to a minor, on January 20, 1886. Trial in the Superior Court, before *Thompson, J.*, who allowed a bill of exceptions, in substance as follows :

The government introduced as a witness one Rollins, and asked him where he was born. His answer was, "In Boston." The district attorney then asked him how old he was. To this question the defendant objected; but the judge permitted the question to be answered, against the defendant's exception. The witness answered, that he was twenty years old on May 15, 1885. The witness was then asked if he went to Gilbertville last January, and answered that he did, and that he went to the Caledonian House, a hotel, and there found the defendant, from whom he engaged rooms at the hotel for a few days. Rollins then testified, that he and another man by the name of Emery, who came from Boston with him, went out of the hotel to see what they could find among the saloons in the town; that they went into the defendant's saloon, which was in a small building standing close outside the hotel. The district attorney asked the witness what he got there. The defendant objected to the question, unless it was to appear that the defendant was present or sanctioned the acts done there at that time. The judge permitted the question to be answered, and the defendant excepted. The witness replied that he purchased two glasses of gin of one Briggs, the defendant's bar-tender, who was in attendance at the saloon; that he and Emery went out, and returned and purchased other glasses of gin of Briggs in the same saloon; that at no time did he get any liquor at the place of the defendant other

than the saloon, or when the defendant was in the saloon; and that he did not purchase or get, in any way, any liquor of the defendant.

The government then called Emery, who testified in substance as did Rollins.

The defendant asked the judge to rule that, if the jury should find upon the evidence that Briggs was the defendant's bartender, and in this respect his agent, they would not be authorized in finding the defendant guilty, unless they should find that he authorized or sanctioned the act of Briggs in selling to a minor. The judge refused to give this ruling in the words asked for.

The defendant then asked the judge to instruct the jury, that the presumption in law is that a principal does not authorize criminal acts of an agent; and that, before they could convict the principal, they must find that he authorized or sanctioned the criminal acts of his agent.

The judge ruled that, to warrant the jury in finding the defendant guilty of a violation of the law relating to the sale of intoxicating liquors, by reason of a sale made by his servant, the government must prove that the act of the servant was done by the authority of the defendant, or with his approval; that the act of the servant must be the authorized act of the master, before the master could be held to answer criminally for it; that, in the present case, the government must show that the sale made by Briggs was a sale authorized by the defendant, and, unless they so found, they could not hold the defendant responsible for it; but if the defendant's bartender, in the saloon of the defendant, in the usual and ordinary course of his business, made sales of liquor, the sales made by the bartender were *prima facie* evidence of a sale by the defendant, whether made to a minor or to any other person, and such a sale made to a minor, unexplained, would, if proved, warrant the jury in finding the defendant guilty of making an illegal sale of intoxicating liquors, but it would be open to the defendant to show that the sale was not made by his authority. The judge also ruled, that there was no presumption that, when a servant, in the regular course of his business as such servant, violated a regulation against the sale of intoxicating liquors, he was acting in violation of the orders or

authority of his master, but the presumption was the other way, that he was acting in pursuance of the authority of the master, while the presumption of law was that every man is innocent until he is proved guilty, the presumption of fact was that the sale of the servant, done in the regular course of the business of the master, was done by the authority of the master; and, if the bar-tender of the defendant sold intoxicating liquors to a minor when acting in the regular course of his business of selling liquors as such bar-tender, that, unexplained, would be sufficient to warrant the jury in finding that the sale was made by the authority of the defendant, so as to make him criminally responsible for the sale.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*J. R. Thayer*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

**HOLMES, J.** The instructions to the jury stated that a sale to a minor by a bar-tender in the course of his master's lawful business raised a presumption of fact against the master, in stronger terms than in *Commonwealth v. Briant*, ante, 463; and the exceptions must be sustained for the reasons given in that case. The sale seems to have been to the same person as in *Commonwealth v. Briant*, and the facts disclose that, by his own statement, the alleged minor was twenty years and eight months at the time the sale took place. This fortifies the suggestion in the former opinion, that the sale might be explained by the bar-keeper's thinking that the minor was of full age, as well as by his master's having authorized him to sell to minors.

We see no sufficient reason why a person should not be allowed to testify to the date of his birth, if that question is fairly open on the exceptions. The certificate which is made evidence by the Pub. Sta. c. 32, § 11, is hearsay, and no more likely to be accurate than the sworn statement of the party concerned, based, as it must be, on family tradition, and fortified by his knowledge of himself. *Hill v. Eldridge*, 126 Mass. 234. *Cheever v. Congdon*, 34 Mich. 296. *State v. Cain*, 9 W. Va. 559, 570.

*Exceptions sustained.*

## COMMONWEALTH vs. NAPOLEON MANDEVILLE.

Worcester. October 4. — 21, 1886. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint for keeping intoxicating liquors with intent to sell the same contrary to law, the evidence tended to prove that the defendant kept lager beer with intent to sell the same to be used as a beverage, and to be drunk on the premises. The judge instructed the jury, that "a license of the sixth class gave to the party holding the same the right to keep for sale and to sell intoxicating liquors for three purposes only, namely, medicinal, mechanical, and chemical, and gave the holder no right to keep for sale or to sell intoxicating liquors to be used as a beverage, and gave no right to keep for sale or to sell intoxicating liquors to be drunk on the premises." *Held*, that the defendant had no ground of exception.

HOLMES, J. This is a complaint for keeping intoxicating liquors with intent to sell the same contrary to law. The evidence tended to prove that the defendant "kept lager beer with intent to sell the same to be used as a beverage, and to be drunk on the premises." The only exception not waived is to an instruction that "a license of the sixth class gave the party holding the same the right to keep for sale and to sell intoxicating liquors for three purposes only, namely, medicinal, mechanical, and chemical, and gave the holder no right to keep for sale or to sell intoxicating liquors to be used as a beverage, and gave no right to keep for sale or to sell intoxicating liquors to be drunk on the premises."

It is argued that a beverage is only a drink, and that liquors sold for medicinal purposes are sold to be used as a drink. It is also argued that it may be necessary that liquors sold for medicinal purposes should be drunk on the premises. But, taking the whole instruction together, the meaning of the court was perfectly plain, and was correct. Sales of liquors to be used as a beverage were spoken of by way of antithesis to sales for medicinal purposes, and signified sales of liquors to be drunk for the pleasure of drinking, as distinguished from sales of liquors to be drunk in obedience to a doctor's advice. Then, as to the other point, we need not consider whether, in an extraordinary case, it may be necessary and lawful that a prescribed dose should be drunk at once, and therefore on the premises, because the court



authority of his master, but the presumption was the other way, that he was acting in pursuance of the authority of the master; that, while the presumption of law was that every man is innocent until he is proved guilty, the presumption of fact was that the act of the servant, done in the regular course of the business of the master, was done by the authority of the master; and, if the bar-tender of the defendant sold intoxicating liquors to a minor, when acting in the regular course of his business of selling liquors as such bar-tender, that, unexplained, would be sufficient to warrant the jury in finding that the sale was made by the authority of the defendant, so as to make him criminally responsible for the sale.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*J. R. Thayer*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

HOLMES, J. The instructions to the jury stated that a sale to a minor by a bar-tender in the course of his master's lawful business raised a presumption of fact against the master, in stronger terms than in *Commonwealth v. Briant*, ante, 463; and the exceptions must be sustained for the reasons given in that case. The sale seems to have been to the same person as in *Commonwealth v. Briant*, and the facts disclose that, by his own statement, the alleged minor was twenty years and eight months at the time the sale took place. This fortifies the suggestion in the former opinion, that the sale might be explained by the bar-keeper's thinking that the minor was of full age, as well as by his master's having authorized him to sell to minors.

We see no sufficient reason why a person should not be allowed to testify to the date of his birth, if that question is fairly open on the exceptions. The certificate which is made evidence by the Pub. Sts. c. 32, § 11, is hearsay, and no more likely to be accurate than the sworn statement of the party concerned, based, as it must be, on family tradition, and fortified by his knowledge of himself. *Hill v. Eldridge*, 126 Mass. 234. *Cheever v. Congdon*, 84 Mich. 296. *State v. Cain*, 9 W. Va. 559, 570.

*Exceptions sustained.*

## COMMONWEALTH vs. NAPOLEON MANDEVILLE.

Worcester. October 4. — 21, 1886. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint for keeping intoxicating liquors with intent to sell the same contrary to law, the evidence tended to prove that the defendant kept lager beer with intent to sell the same to be used as a beverage, and to be drunk on the premises. The judge instructed the jury, that "a license of the sixth class gave to the party holding the same the right to keep for sale and to sell intoxicating liquors for three purposes only, namely, medicinal, mechanical, and chemical, and gave the holder no right to keep for sale or to sell intoxicating liquors to be used as a beverage, and gave no right to keep for sale or to sell intoxicating liquors to be drunk on the premises." *Held*, that the defendant had no ground of exception.

HOLMES, J. This is a complaint for keeping intoxicating liquors with intent to sell the same contrary to law. The evidence tended to prove that the defendant "kept lager beer with intent to sell the same to be used as a beverage, and to be drunk on the premises." The only exception not waived is to an instruction that "a license of the sixth class gave the party holding the same the right to keep for sale and to sell intoxicating liquors for three purposes only, namely, medicinal, mechanical, and chemical, and gave the holder no right to keep for sale or to sell intoxicating liquors to be used as a beverage, and gave no right to keep for sale or to sell intoxicating liquors to be drunk on the premises."

It is argued that a beverage is only a drink, and that liquors sold for medicinal purposes are sold to be used as a drink. It is also argued that it may be necessary that liquors sold for medicinal purposes should be drunk on the premises. But, taking the whole instruction together, the meaning of the court was perfectly plain, and was correct. Sales of liquors to be used as a beverage were spoken of by way of antithesis to sales for medicinal purposes, and signified sales of liquors to be drunk for the pleasure of drinking, as distinguished from sales of liquors to be drunk in obedience to a doctor's advice. Then, as to the other point, we need not consider whether, in an extraordinary case, it may be necessary and lawful that a prescribed dose should be drunk at once, and therefore on the premises, because the court

was speaking generally of ordinary cases, and was only following the statute, which requires a license of the second class in order to warrant sales of malt liquors to be drunk on the premises. Pub. Sts. c. 100, § 10. There is nothing to show that there were any extraordinary circumstances about the sales in question.

*Exceptions overruled.*

*J. R. Thayer*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

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COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS,  
Thomas Kelley, claimant.

Worcester. October 4. — 21, 1886. DEVENS & W. ALLEN, JJ., absent.

A complaint made by "Freewaldau C. Thayer," signed "F. C. Thayer, complainant," and certified by the clerk of the court to which it is addressed to have been "received and sworn to before said court," sufficiently appears to be signed and sworn to by the complainant.

The oath of one of the complainants, required by the Pub. Sts. c. 100, § 81, to authorize the issue of a warrant to search a dwelling-house for liquor, does not form a part of the complaint, although incorporated therein; and, at the trial to determine whether the liquor seized shall be forfeited, the government is not required to prove that intoxicating liquor has been sold in the house contrary to law within one month prior to the filing of the complaint.

COMPLAINT, on the Pub. Sts. c. 100, § 30, to the Central District Court of Worcester, alleging that, on July 6, 1886, certain intoxicating liquors were kept and deposited by Thomas Kelley in a certain dwelling-house, the cellar under the same, the out-buildings, and the premises there situate, to wit, on Woodland Street in Worcester, and occupied by Kelley, a place of common resort being then kept therein, which liquors were intended by Kelley for unlawful sale in this Commonwealth; and praying for a warrant to search said premises for said liquors, that the same might be declared to be forfeited, and that Kelley and all other persons claiming an interest in said liquors might be summoned to appear before said court, to show cause why said liquors should not be declared forfeited. The complainant, in the body thereof,

purported to be made by Freewaldau C. Thayer and Amos Atkinson, and it was signed "F. C. Thayer, Amos Atkinson, complainants."

In the body of the complaint was incorporated the following affidavit: "And I, Freewaldau C. Thayer, one of the above-named complainants, on oath, say that I have reason to believe, and do believe, that intoxicating liquor, such as is above mentioned, has been sold in the house above mentioned by the occupant of said house, and with the consent and permission of the occupant of said house, contrary to law, within one month next before this day, and that said liquor above mentioned is now kept in said house for sale by said Kelley contrary to law, and my belief aforesaid is founded on the following facts and circumstances: Common report is that intoxicating liquors are sold there."

The jurat attached to the complaint was as follows: "Worcester, ss. Received and sworn to this sixth day of July in the year of our Lord one thousand eight hundred and eighty-six, before said court. E. T. Raymond, Clerk."

The warrant issued on the complaint set forth that the complaint was made by Freewaldau C. Thayer and Amos Atkinson.

Certain liquors were seized on the warrant. Said Kelley appeared as claimant thereof in the Superior Court, and, before the jury were empanelled, filed a motion to dismiss the complaint, for the following reasons: "1. The offence is not fully, plainly, and substantially described in the complaint and warrant. 2. The names of the complainants are not set out in the warrant. 3. The complaint is uncertain and indefinite as to the place to be searched, and as to the place in which the liquors are alleged to have been kept." *Blodgett, J.*, overruled the motion, and the claimant excepted.

At the trial there was evidence tending to show that a part of the liquors described in the complaint were found by the officer in the cellar of the dwelling-house of the claimant.

The claimant asked the judge to instruct the jury that "the Commonwealth must prove affirmatively that liquors were sold from the dwelling-house described within one month prior to July 6, in order to warrant the confiscation of the liquors there found." The judge refused to rule as requested.

The jury found that the liquors described in the complaint were kept by the claimant for sale in violation of law; and the claimant alleged exceptions.

*J. Hopkins*, for the claimant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

MORTON, C. J. In the body of the complaint, Freewaldau C. Thayer and Amos Atkinson are named as complainants. The complaint is signed "F. C. Thayer, Amos Atkinson, complainants." The form of the signature and the official certificate of the clerk of the court clearly show that F. C. Thayer was one of the complainants, and identifies the F. C. Thayer who signed and swore to the complaint as the same person described as Freewaldau C. Thayer in the complaint. *Commonwealth v. Quin*, 5 Gray, 478. *Commonwealth v. Wallace*, 14 Gray, 382. No other insufficiency in the complaint was suggested at the argument, and the motion to quash was rightly overruled.

The statute provides that no warrant shall be issued for the search of a dwelling-house, unless one of the complainants makes oath or affirmation that he has reason to believe, and does believe, that intoxicating liquor has been sold therein, or taken therefrom for the purpose of being sold contrary to law, by the occupant, within one month next before making such complaint, and is then kept therein for sale contrary to law by the person complained against. Pub. Sts. c. 100, § 31. In this case, the warrant was issued for the search of a dwelling-house, and one of the complainants duly made the oath required by the statute. At the trial, the claimant asked the court to rule that "the Commonwealth must prove affirmatively that liquors were sold from the dwelling-house described within one month prior to July 6, in order to warrant the confiscation of the liquors there found." The court rightly refused this ruling.

The statute provides, that, "if it appears that the liquor, or any part thereof, was at the time of making the complaint owned or kept by the person alleged therein, for the purpose of being sold in violation of law," the court shall render a judgment of forfeiture. Pub. Sts. c. 100, § 37. The fact that liquor has been sold in the dwelling-house within a month before the making of the complaint, is not one of the elements of the offence

which subjects the liquor seized to forfeiture, and is not an issue in the hearing after the service of the search-warrant. The warrant being duly issued, the only question to be tried is whether the liquors were, at the time of making the complaint, kept for the purpose of being sold in violation of law. See *Commonwealth v. Intoxicating Liquors*, 105 Mass. 181.

*Exceptions overruled.*

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COMMONWEALTH vs. JOHN H. WELCH.

Plymouth. October 19. — 21, 1886. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the testimony of an officer, who had searched the defendant's premises, that a tumbler which he seized contained intoxicating liquor, is competent, without producing the liquor, or accounting for its absence.

COMPLAINT for keeping and maintaining a common nuisance, to wit, a certain tenement in Brockton, used for the illegal sale and illegal keeping of intoxicating liquors, on January 1, 1886, and on divers other days and times between that day and June 3, 1886.

At the trial in the Superior Court, before *Mason, J.*, a witness testified that he was a police officer, and was aiding another officer who had a warrant to search for intoxicating liquors in the defendant's house, duly issued under the statute; and that the defendant was present; but it did not appear that any warrant was shown.

The witness was allowed, against the defendant's objection, to testify to the contents of a tumbler which he seized from the person of the defendant and carried away, which was not produced at the trial, and the absence of which was not accounted for; and no proceedings for forfeiture had been instituted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*C. G. Davis*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

BY THE COURT. If we assume, in favor of the defendant, that the officer testified that the tumbler which he seized contained intoxicating liquor, his testimony was competent, without producing the liquor, or accounting for its absence. Such testimony is not secondary evidence, within the rule that the best evidence must be produced unless destroyed or otherwise accounted for. *Commonwealth v. Blood*, 11 Gray, 74. *Commonwealth v. Pope*, 103 Mass. 440. *Exceptions overruled.*



### COMMONWEALTH vs. MICHAEL ROONEY.

Plymouth. October 19. — 21, 1886. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint on the Pub. Sts. c. 101, § 6, for keeping and maintaining "a certain building," used for the illegal keeping and illegal sale of intoxicating liquors, a witness testified that, on a certain day, he was in the defendant's "house," and bought liquor there, and another witness testified that, on a certain day, he was "at the defendant's house, in the front room," and liquor was sold there. *Held*, that there was sufficient evidence to warrant the jury in finding that the defendant kept and maintained the whole building, and that the same or some part thereof was used for the purpose alleged in the complaint.

COMPLAINT, on the Pub. Sts. c. 101, § 6, and dated March 29, 1886, to the Third District Court of Plymouth, alleging that the defendant, at Duxbury, on September 29, 1885, "and thence continually, until the day of the making of this complaint, did unlawfully keep and maintain a certain building there, during all said time, used for the illegal keeping and illegal sale of intoxicating liquors, to the common nuisance of all the people, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

Trial in the Superior Court, on appeal, before *Mason, J.*, who allowed a bill of exceptions, in substance as follows:

One O. C. Crocker was called as a witness, and testified that he knew the defendant; that he was in his house, at West Duxbury, on March 28, 1886, and bought cider twice in a jug; that he bought a gallon each time, and paid twenty-five cents for each gallon to the defendant; that the cider he bought was quite

hard; that he bought it in the house; and that a boy went out each time and got it and brought it in.

One Jules Giquel was also called as a witness, and testified that he lived in New Bedford; that on March 27 and 28, 1886, he was at the defendant's house, in the front room; that on Saturday, March 27, he saw cider there; that there were three persons there drinking cider from a jug; that five men came in afterwards and called for cider, and a boy brought up a jug full; that the men paid the defendant for the cider; that there was one man there so drunk he could hardly move; that on Sunday, March 28, he went there, and two men were there; that in the afternoon there were fourteen or fifteen men there; and that they had cider there several times, and drank it there, and paid the defendant for it.

This was all the evidence introduced by the government, and was all the evidence in the case. Upon this evidence, the defendant requested the judge to instruct the jury to return a verdict of not guilty, on the ground of a variance between the allegation and the proof, for the following reasons: 1. Because there was no evidence, sufficient in law, to prove that the defendant did "continually" and "all said time" keep and maintain the building described in the complaint, and "continually" and "all said time" use the same, for the illegal keeping and illegal sale of intoxicating liquor. 2. Because there was no evidence sufficient in law to prove that a "building" was kept and maintained as alleged in said complaint.

The judge declined to instruct the jury as requested; and instructed them that if, upon the evidence, they were satisfied, beyond a reasonable doubt, that, during any substantial portion of the time named in the complaint, the defendant kept and maintained the whole building described in the complaint, and the same or any part thereof was, during any substantial portion of the time it was so kept and maintained, used for the illegal keeping or illegal sale of intoxicating liquors, they should convict the defendant.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*H. Kingman*, for the defendant. The court should have instructed the jury to return a verdict of not guilty, because there



was no evidence that a "building" was kept and maintained as alleged in the complaint. The complaint having alleged that the defendant "did keep and maintain a certain building," the government was bound to prove that the whole of said building was kept and maintained by the defendant. *Commonwealth v. McCaughey*, 9 Gray, 296. *Commonwealth v. Logan*, 12 Gray, 136. *Commonwealth v. Wellington*, 7 Allen, 299. This the evidence did not do, as the only evidence in the case was the single statement of Crocker that the defendant "was in his house," and the statement of Giquel that he "was at the defendant's house." This does not prove beyond a reasonable doubt that this house was an entire building; nor does it prove that it was not a tenement in, and a part of, an entire building. The court, therefore, should not, upon this evidence, have left it to the jury to find whether the defendant kept and maintained the whole building described in the complaint, or not.

*E. J. Sherman*, Attorney General, for the Commonwealth.

BY THE COURT. There was evidence tending to prove that the house in which liquors were sold was kept and maintained by the defendant. Two witnesses testified that it was his house, and that he was then selling intoxicating liquor, apparently in control and possession of the house.

The court rightly submitted the case to the jury, under instructions that, if the defendant kept and maintained the whole building described in the complaint during any part of the time named therein, and used any part of it for the illegal keeping or illegal sale of intoxicating liquor, they could convict him of the offence charged. *Commonwealth v. Logan*, 12 Gray, 136. *Commonwealth v. Mitchell*, 115 Mass. 141. *Commonwealth v. Kerissey*, 141 Mass. 110. *Exceptions overruled.*

## GEORGE H. PLACE &amp; others vs. EDWIN SAWTELL.

Plymouth. October 19. — 21, 1886. DEVENS & W. ALLEN, JJ., absent.

The heirs at law of a mortgagor of land cannot maintain trover against an assignee of the mortgage, in possession for breach of condition, before foreclosure, for cutting and carrying away trees growing on the land.

TORT, in two counts. The first count was for breaking and entering the plaintiffs' close in Brockton, and cutting down and carrying away certain trees. The second count was for the conversion of the trees. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The plaintiffs claimed title to the locus described in the first count, as heirs at law of Darius Place, under a deed from Nathaniel Ames to said Place, which was duly recorded. There was evidence tending to show that Place made and delivered to one Thomas Wales a mortgage of the locus, dated November 18, 1858, which was duly recorded; that there was a breach of the condition of said mortgage, and that Wales, in consequence of a letter from the mortgagor to him, stating that he wanted to give up the land as he could not pay for it, entered upon and took possession of the locus, under said mortgage, and continued in possession until his death, July 7, 1865; that the defendant purchased said mortgage, and had an assignment thereof from the administrator of the estate of Wales, dated September 27, 1884, which was duly recorded, and was in possession of the locus, under said mortgage, for breach of condition; that no certificate of such entry or possession was ever made or recorded; that, while the defendant was so in possession of the locus, he cut and carried away wood standing and growing thereon; and that, for such cutting and carrying away of wood, the plaintiffs sought to recover in this action.

The judge ordered a verdict for the defendant on the first count.

The defendant requested the judge to rule that the defendant, being in possession of the locus under the mortgage assigned to him, had the right to cut and carry away wood standing and

growing thereon; and that the plaintiffs could not maintain this action against him therefor. The judge refused to rule as requested, and instructed the jury that the defendant had no right to cut and carry away wood, to the injury of the land; and that, if the defendant, by the cutting and carrying away of wood standing and growing thereon, had done more than good husbandry required, and had injured the property and despoiled the land so that it could not be restored, the plaintiffs could recover, under the second count, the damage so sustained by them.

The jury returned a verdict for the plaintiffs for \$75, on the second count; and the defendant alleged exceptions.

*H. Kingman*, for the defendant.

*E. Robinson*, for the plaintiffs.

BY THE COURT. It was held in *Butler v. Page*, 7 Met. 40, that, where a mortgagee in possession sold buildings standing upon the mortgaged premises to a purchaser, who removed them, the administrator of the mortgagor could not maintain trover against such purchaser to recover the value of the buildings or the materials. The decision is put upon the ground that, at the time of the mortgagor's decease, the fee of the mortgaged premises, as between him and his mortgagees, was in the latter, and the removal of these buildings vested no property in the materials in the representative of the mortgagor, and therefore an action of trover could not be maintained. This case is decisive of the case at bar.

The ruling of the Superior Court, that the plaintiffs could maintain their second count, was therefore erroneous.

*Exceptions sustained.*

HELEN W. G. NOTT *vs.* C. T. SAMPSON MANUFACTURING  
COMPANY.

Berkshire. Sept. 14, 15. — Oct. 22, 1886. DEVENS, W. ALLEN,  
& C. ALLEN, JJ., absent.

In 1863, a ward's interest in land was sold by his guardian under a license from the Probate Court, of which proper notice was not given. The sale was conducted in good faith. All the other interests in the land were sold at the same time, and the land brought its full value. Expensive improvements were subsequently made upon the land by the purchasers, without knowledge of any defect in the title. The guardian charged himself with the proceeds of the sale in his account, and was charged by the court. Suit was brought on his bond by a subsequently appointed guardian, which was prosecuted by the ward after he became of age in 1882. *Held*, that these facts constituted an equitable defence, under the St. of 1883, c. 223, § 14, to a writ of entry, brought by the ward in 1885, to recover his interest in the land.

If a guardian's sale under a license of the Probate Court is void on account of a defective notice, it may be confirmed by a proceeding in equity under the Pub. Sts. c. 142, § 22, although made before the passage of the St. of 1873, c. 253, § 3, of which § 22 of the Pub. Sts. c. 142, is a reenactment.

HOLMES, J. This is a writ of entry, dated December 3, 1885, to recover one eighth of two ninths of a parcel of land in North Adams, which descended to the demandant as one of the heirs of Samuel H. Gaylord. The demandant was born on May 15, 1861. On November 21, 1863, her guardian, who was also her father, sold the demanded premises, in pursuance of a license from the Probate Court, and the tenant is a subsequent grantee of the premises thus conveyed. The demandant seeks to recover on the ground that the notice of the guardian's sale was bad, especially in not setting forth sufficiently the time and place of the sale. The words were, "On Saturday, Nov. 21st, 1863, at North Adams, Mass., Berkshire." The tenant alleges that the notice was sufficient, but more particularly relies on an equitable defence, under the St. of 1883, c. 223, § 14,\* based on the facts that the sale was conducted fairly and in good faith; that it took place at the same time the other interests were sold; that the land

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\* "In actions at law, . . . the defendant shall be entitled to allege as a defence any facts that would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action."

brought its full value; that expensive improvements have been made upon the land by the original and by subsequent purchasers, without knowledge of any defect in their title, or claim on the part of the demandant; that the guardian charged himself with the proceeds of the sale in his account, and was charged by the court, although an appeal was taken from the decree of the Probate Court by one of the sureties on the guardian's bond; and that suits were brought on the guardian's bond by a subsequently appointed guardian, which were prosecuted by the demandant after she became of age, on May 15, 1882. "She knew in substance what they were doing and trying to do," although neither she nor her counsel had their attention called to the question of the validity of the sale until May 7, 1885, and she did not personally know that the funds received by her father were the proceeds of that sale until July of the last-named year.

The court ruled, that the notice was insufficient, that the guardian's sale did not pass the ward's title, and that the demandant was not estopped from contesting the validity of that sale, or from maintaining this action against the tenant. The court found for the demandant, and the report reserves the question whether the rulings and finding were correct.

We understand the report to be intended to raise the question whether the facts disclose any equitable defence, and not simply whether they show such an equitable defence as, in strictness, is to be stated in terms of estoppel. We gather this construction from the reservation as to the finding, as well as from the last ruling.

If the sale was void by reason of defects in the notice, a case is presented for a confirmation of the sale under the Pub. Sts. c. 142, § 22, if that statute applies to sales made before its passage. For it appears that the defects in the notice did the demandant no harm, that the sale was made in good faith and was advantageous to the demandant, that the purchaser paid full value, and that expensive improvements have been made without knowledge of any defect in the title. These facts would seem to be enough, of themselves, apart from the other facts which we have stated as relied on by the tenant. See *Chandler v. Simmons*, 97 Mass. 508, 511.

The demandant suggests, that to apply the Pub. Sts. c. 142, § 22, to sales made before the act which it embodies was passed,\* would be to give it a retrospective effect. But this is hardly correct, even technically, and not at all in the sense which makes retrospective statutes objectionable. The statute provides for future proceedings to confirm acts void when the proceedings are instituted. The confirmation takes place after the statute. The evil sought to be cured is as great when the defect existed before the statute was passed, as when the void act was done afterwards. The defect is no greater, and there is no more a vested right to insist upon it, in the one case than in the other. A statute may lawfully correct or authorize the correction of existing defects of form. *Weed v. Donovan*, 114 Mass. 181. When therefore a statute purports to authorize the correction of such defects, in general terms, ("when an act is void,") it is properly construed to apply to defects then existing, as well as to subsequent ones.

It was asked if the deed could be confirmed in this way without a suit brought by the tenant for that purpose. Perhaps not. But when facts appear which would warrant a confirmation and an injunction against proceeding with this action if the tenant brought a bill, they constitute an equitable defence none the less that a bill is still necessary before the tenant can receive affirmative relief. It is only in their negative aspect that they are relied on here.

If the sale was not void, but only voidable, and if for that reason it is not within § 22, still the principle on which the relief of confirmation is granted in the case of a grave defect would seem to apply, with stronger reason, to give an equitable defence when the defect is of too little importance to be covered by the statute. See also § 23.

There is no doubt that the defence is equitable in its nature, both by the express words of § 22, and by the analogy of cases decided apart from statute. *Wortman v. Skinner*, 1 Beasley, 358, 379. *De Riemer v. Cantillon*, 4 Johns. Ch. 85. *M'Pherson v. Cunniff*, 11 S. & R. 422, 426-429. *Wilson v. Bigger*, 7 Watts & S. 111, 125. *Smith v. Warden*, 19 Penn. St. 424. *Spragg v. Shriver*,

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\* St. 1873, c. 253, § 3.

25 Penn. St. 282. *McKee v. Hann*, 9 Dana, 526, 541. *Dickinson v. Durfee*, 139 Mass. 232. *Judgment for the tenant.*

*H. L. Dawes & M. Wilcox*, (*J. Dewey* with them,) for the tenant.

*D. W. Bond*, (*D. Hill & J. A. Wainwright* with him,) for the demandant.

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ALBERT S. ATKINS *vs.* BARNEY T. WITHERELL.

Hampshire. Sept. 21. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

On a complaint, under the mill act, brought by A. against B., the Superior Court determined that B. maintained his dam higher than he had a right to maintain it in that part of the year between April 12 and November 1. After this adjudication, the jury found that the height of the dam between April 12 and November 1 should be established at its height as viewed on October 16, 1888, and that it should be left open a space of not less than ten feet in width; and fixed the past damages, and determined what would be proper compensation for future damages. B. paid both sums. A. afterwards brought an action against B. for maintaining his dam higher than he had a right to maintain it. The judge ruled, "that the former finding of the court and jury should be construed to mean that the defendant was not required to alter his dam as to height from what it was on October 16, 1888; and that the former jury had a right to fix the height as they did fix it, although the finding of the court, that it was higher than the defendant had a right to have it, had been made." *Held*, that A. had no ground of exception.

TORT. The declaration alleged that the defendant was the owner of a mill and dam on a certain stream below the land of the plaintiff; that the defendant had the right to keep his dam at a certain height during a portion of the year, which right had been determined by the Superior Court; and that the defendant had not complied with the order of the court, but had kept and maintained the dam at a greater height, and for a longer time, than by law and by the order of the court he had a right to do.

Trial in the Superior Court, before *Staples, J.*, who allowed a bill of exceptions, in substance as follows:

In 1880, upon a complaint under the mill act, by the present plaintiff against the present defendant, the Superior Court found

that the defendant had maintained his dam higher than he had a right to maintain the same in that part of the year between April 12 and November 1, and that he had not so maintained it during the rest of the year. On October 19, 1883, the jury who heard the complaint rendered the following verdict:

"Upon the complaint of Albert S. Atkins, the jury assess the amount of damages sustained by the complainant Atkins, within three years next preceding the institution of the complaint, and to the time of rendering the verdict, in the sum of one hundred dollars and no cents.

"The jury find and decide that the dam, between the twelfth day of April and the first day of November next after, shall be established at its height as viewed October 16, 1883, and that it shall be left open a space of not less than ten feet in width.

"The jury find and determine that ten dollars, to be paid annually to the complainant, would be a just and reasonable compensation for the damages that may be thereafter occasioned by the dam so long as it is used in conformity with the verdict, and that one hundred dollars in gross would be a just and reasonable compensation for all damages thereafter to be occasioned by such use of the dam, and for the right of maintaining and using the same forever in manner aforesaid."

Immediately after the verdict, the plaintiff elected to take the gross sum assessed by the jury for future damages, and it was paid to him by the defendant.

The present action was brought for the maintaining of the dam during the summer of 1884 at a height alleged to be too great.

The dam in question was constructed, seven years ago, in the following manner: Timbers were placed across the stream at intervals, on which two lengths of planks were placed to make the dam, so as to reach from the top of the dam to the bottom of the stream, the bottom of the dam being several feet farther up stream than the top. The dam was about seventy-five feet long. A former dam, situated at the same place, had been opened in summer by taking up a few planks from the top to the bottom of the dam, thereby drawing off the entire pond. The present dam was arranged to draw down the pond in summer about four



feet, by taking out some of the top length of planks only, leaving all the lower length of planks in place. Since the present dam was built, until the verdict of the jury, it was each summer drawn down by taking up enough of the top length of planks to make a space between eight and nine feet wide, and thus to draw down the pond about four feet, leaving the pond partly full. With the height of water so retained, some light work in sawing had been occasionally done in summer. That was so during the time covered by the judge's findings. The dam was in that condition, and there was that height of water when viewed by the jury.

Since the verdict, it has, during the summer, been open in the same way and to the same height, except that the opening has been ten feet wide since that time, instead of between eight and nine feet, as before. If both lengths of plank were taken out for a space of ten feet in width, thus opening the dam to the bottom of the stream ten feet wide, as the plaintiff contended it should be, it would leave no pond whatever, and would do the plaintiff no damage.

It was admitted that the plaintiff was not entitled to recover unless the defendant was required by said finding and verdict to keep his dam open in summer ten feet wide for its whole height.

It was contended by the plaintiff, that the said findings should be construed by the court to mean that the dam should be left open for the space of ten feet, its whole height, during the summer, and that, the court having found at a former trial that the defendant had maintained the dam higher in the summer than he had a right to do, the jury could not say that the defendant might maintain it at that height.

It was agreed that the defendant had maintained the dam in the summer since the verdict of the jury, and for five years before, at the same height as the jury saw it on their view, October 16, 1883.

The judge ruled "that the former finding of the court and jury should be construed to mean that the defendant was not required to alter his dam as to height from what it was on October 16, 1883; and that the former jury had a right to fix the height as they did fix it, although the finding of the court, that

it was higher than the defendant had a right to have it, had been made."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

*H. W. Ely & C. F. Ely*, for the plaintiff.

*W. G. Bassett*, for the defendant.

GARDNER, J. The Superior Court determined, in 1880, that the present defendant maintained his dam higher than he had a right to maintain it in that part of the year between April 12 and November 1. It is evident that this adjudication did not go to the full extent of absolutely prohibiting the respondent from keeping his dam up during the summer months. It did not fix any height at which he might keep his dam, nor did it award compensation to the complainant. Adjudicating that the dam was maintained during the summer months higher than he had a right to maintain it, was in effect saying that it was maintained higher than the respondent had a right to maintain it without compensation.

Under this complaint, in 1883, the jury established and regulated the summer height of the dam. By their verdict, the jury found and decided "that the height of the dam, between the twelfth day of April and the first day of November next after, shall be established at its height as viewed October 16, 1883, and that it shall be left open a space of not less than ten feet in width." The jury also fixed and determined the amount which should be paid annually to the complainant, as "just and reasonable compensation for the damages" occasioned by the dam, so long as it is used in conformity with the verdict. They also fixed a sum in gross which would be a just and reasonable compensation for all damages occasioned by such use of the dam, "and for the right of maintaining and using the same forever in manner aforesaid." After the verdict, the complainant elected to take the gross sum assessed by the jury for future damages, and it was paid him by the respondent.

At the trial of the present action, it became material to determine what construction should be put upon this verdict. The plaintiff contends that the verdict must be construed to mean that the dam shall be kept open for the free passage of the stream during the summer months; that during those months

the water should flow unobstructed, and that the dam should be left open for a space of ten feet throughout its whole height. This construction is clearly inconsistent with the verdict. If the dam was lowered so that the water would flow unobstructed in its natural channel, it is difficult to see how the plaintiff was injured, and for what he was entitled to compensation for future damages. The jury determined that, during the summer months, the dam was to be established at the height which the jury found it to be on October 16, 1883; and that the opening of the dam above this height was to be ten feet wide. It does not mean that this opening of ten feet wide was to extend from the top of the dam to its bottom, so that the water would flow in its natural channel, without obstruction. The jury, under the Pub. Sts. c. 190, §§ 3, 17, had the right to establish and regulate by their verdict the height at which the dam might be maintained during the summer months. *Brady v. Blackinton*, 113 Mass. 238. This verdict was obtained by the plaintiff in the present action, and acquiesced in by him. He received the money which the jury awarded him as full compensation in gross. Without determining whether the plaintiff "is estopped, as against the defendant, to deny that that for which he took his money was rightly adjudicated," we think that the construction put upon the verdict by the Superior Court was correct.

*Exceptions overruled.*

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#### JOSEPH A. FORTIN *vs.* INHABITANTS OF EASTHAMPTON.

Hampshire. September 21. — October 22, 1886.

A notice to a town, by a person who has been injured by a defect in a way, stating that, "since falling on the sidewalk in front of the Button shop" on a day named, "I have been unable to work," and "request a settlement," sufficiently designates the cause of the injury, under the Pub. Sts. c. 52, § 19, as amended by the St. of 1882, c. 36.

In an action against a town for personal injuries occasioned by a defect in a way, evidence of a conversation between the plaintiff, who has given a written notice to the town, and a selectman, in which conversation the latter is informed of the time, place, and cause of the accident, is admissible, for the purpose of showing that the town was not misled by the notice, within the St. of 1882, c. 36.

TORT for personal injuries occasioned to the plaintiff by a defect in a highway in Easthampton. Trial in the Superior Court, before *Staples, J.*, who allowed a bill of exceptions, in substance as follows:

It appeared that the following notice, dated March 10, 1885, addressed to the selectmen of the town, and signed by the plaintiff, was sent by the plaintiff to the selectmen, and received by them: "Since falling on the sidewalk in front of the Button shop, Feb. 25th last, I have been unable to work, and am now under the doctor's care, and I hereby notify you to that effect. I request a settlement in some way. Please attend to the matter at once."

The plaintiff, against the defendant's objection, testified as follows: "After the notice was given, Mr. Bosworth, one of the selectmen, called to see me, on Friday, March 13. He said, 'We have got your notice, and I came over to see you, and see what you want to do, — how you want to settle with the town.' I told him I did not want to make any money out of the town, but if I could get my wages and doctor's bill till my leg got as well as it was before, I should be satisfied. He said they could hardly do that, — they would not be allowed to do it; and asked, 'What would you settle for cash?' I said, 'I cannot tell how long I shall be laid up with this leg, and you cannot tell; but I will send for my doctor and ask him about my leg, and you can do the same, and we will see what he says about it.' He said, 'Where was it you fell?' I said, 'I fell right in front of the Button shop.' He asked when it was, and I told him, February 25; he asked what time, and I said about seven o'clock in the evening. He said, 'Where were you going?' I told him I was going up town after a tea-kettle at the tin shop; that I came in front of the Button shop, walking carefully, when all at once my foot slipped from under me, and I fell, my knee striking on the edge of the ice; that I looked, and saw there was a hole in the sidewalk; that my knee struck on the edge of the hole; that I got up and walked up town and did my business and went home, and I noticed the sidewalk as I came back home; it was still light enough. I told Mr. Bosworth it was between the two gates, the gates where the help go in and the office gate, and nearest to the gate where the help go in. These two gates are about forty or forty-five feet apart. He did not ask me anything

further about it. I did not intend to mislead the selectmen about the time, place, or cause of the injury. I intended to let them know all about it. Mr. Bosworth did not say anything about being misled by the notice; he said he got the notice, and came over to see what settlement I wanted to make; that the selectmen were going to have a meeting that night, and he was going to bring it up. I had seen Mr. Ludden, another of the selectmen, on March 7; that was before I gave the notice. He came in and said, 'You sent for me;' and I said, 'Yes, sir.' He said, 'What do you want?' I said, 'I got hurt on the sidewalk on February 25, and I want to see if I cannot get something for it.' He asked where I got hurt, and I told him in front of the Button shop. He asked if there was ice on the sidewalk, and I told him there was a good deal of it, — three or four inches of ice; that the walk was dug up, and there were holes in the ice; that I was going up town, walking along, and the first thing I knew I was on my hands and knees, and I looked down and I saw there was a hole left where the ice had been dug out, and when I fell I struck my knee on the edge of it. Mr. Ludden said the Button shop folks generally kept their walk pretty clean. I told him where the place was. I told him it was between the two gates, nearest the gate where the help went in. Neither Mr. Bosworth nor Mr. Ludden said to me that they did not know how and where it was I got hurt."

The plaintiff admitted that the walk where he fell was a concrete sidewalk, well wrought, smooth, and level; and that the only defect consisted of the holes in the ice accumulated on the walk, which holes appeared to have been made in attempting to clear the ice from the walk, the walk itself having no holes in it.

It was agreed that Bosworth and Ludden were, at the time above referred to, two of the three selectmen of the town; and that the Button shop was a building about one hundred and forty feet long and situated on Union Street in said town.

The wife of the plaintiff testified, against the objection of the defendant, as to the conversations between her husband and Ludden and Bosworth, in substance the same as testified to by the plaintiff.

The judge ruled that the writing sent by the plaintiff to the selectmen was insufficient in law as a notice under the statute,

or as a notice of the place or cause of the injury complained of; and that it was not cured by the St. of 1882, c. 36, or by the statute in connection with the uncontradicted evidence introduced by the plaintiff; and directed a verdict for the defendant. The plaintiff alleged exceptions.

*D. W. Bond, (J. B. O'Donnell with him,) for the plaintiff.*

*W. G. Bassett, for the defendant.*

HOLMES, J. The notice was not sufficient to satisfy the Pub. Sts. c. 52, § 19, because it did not properly state the cause of the damage, if for no other reason. The defendant argues, that there was a total failure to state any cause, that such a total omission cannot be called an "inaccuracy in stating the cause," and therefore that the plaintiff is not helped by the St. of 1882, c. 36.\* But a majority of the court are of opinion that the argument, as applied to this case, construes the statute too narrowly. When a man states that he was hurt by falling on a sidewalk, and that he demands damages for it, he does imply, although indirectly and insufficiently, that there was something for which the town was responsible as the cause of the damage, and thus that there was something wrong about the way. And this is true, even though the reference to falling is, primarily at least, only for the purpose of fixing a time. It is hard to suppose that the statute intends to cure a misstatement of the cause, which, on the face of things, is more likely to mislead than no statement at all, and yet to allow a simple omission to remain fatal. However this may be, a very slight suggestion of the cause will be sufficient, when the conditions of the statute are complied with.

The evidence of the conversations was admissible, not for the purpose of supplementing the written notice, but for the purpose of showing that the town was not misled. It warranted that inference, and, if the inference was drawn, the defect in the notice was cured.

*Exceptions sustained.*

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\* This act amends § 19 of the Pub. Sts. c. 52, by adding: "But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury: provided, that it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby."

SARAH DELANO *vs.* WATSON L. SMITH.

Hampshire. Sept. 22. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

Four of six heirs of A., who had previously conveyed to B. all their right, title, and interest in certain land, also, so far as they had power, sold to B. the shares — to which they supposed themselves entitled by inheritance — of the other two heirs, whose whereabouts was unknown. B. delivered to C., in trust, two promissory notes for the amount of said two sixths of the land, each payable to one of the absent heirs, whenever the payee, "his heirs, assigns, or legal representatives, shall show me established and confirmed, by conveyance or otherwise, in the legal title to one undivided sixth part of" said land, "now supposed to be outstanding in the" payee. The payment of these notes was secured by a mortgage of said two sixths, given by B. to C. in trust for the two absent heirs, by order of the Superior Court, which assigned said two sixths to B. upon his petition for partition of the land. No payment was made of the debt secured by the mortgage, which was recognized by B. as an existing incumbrance in deeds subsequently executed by him; and neither the death of the two absent heirs, nor the succession of the remaining heirs of A. to their interest in the land, was established. *Held*, that a subsequent grantee of the land could not maintain a petition, under the St. of 1882, c. 237, to have said two sixths declared free of the incumbrance of the mortgage, although B. and those claiming under him had been in uninterrupted possession of the land for twenty years.

PETITION, under the St. of 1882, c. 237,\* filed January 22, 1886, alleging that the petitioner is the owner of a certain parcel of land in Northampton, the record title of which is encumbered by an undischarged mortgage upon two undivided sixth parts thereof, dated June 21, 1865, from Charles Delano, now deceased, to Harrison O. Apthorp, now deceased, in trust for Sylvester

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\* The statute is as follows: "When the record title of real estate is encumbered by an undischarged mortgage, and the mortgagor and those having his estate in the premises have been in uninterrupted possession of such real estate for twenty years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof, he or they may apply to the Supreme Judicial Court by petition, setting forth the facts, and asking for a decree as hereinafter provided; and if, after notice to all persons interested, by publication or otherwise as the court may order, no evidence is offered of any payment on account of the debt secured by said mortgage within said twenty years, or of any other act within said time in recognition of its existence as a valid mortgage, the court may enter a decree setting forth such facts and its findings in relation thereto, which decree shall, within thirty days, be recorded in the proper registry of deeds, and thereafter no action shall be brought by any person to enforce a title under said mortgage."

M. Smith and Charles F. Burt, their heirs and assigns; that the mortgage was made with a proviso for redemption upon payment by said Delano, his executors, administrators, heirs, or assigns, according to the tenor thereof, of two certain promissory notes, dated April 1, 1865, for the sum of \$150 each, with interest at six per cent from date, payable severally to said Smith and Burt, their lawful representatives, or bearer, on demand, whenever the payee, "his heirs, assigns, or legal representatives, shall show me established and confirmed, by conveyance or otherwise, in the legal title to one undivided sixth part of" said land, "now supposed to be outstanding in the" payee; that these notes were delivered to said Apthorp, with the mortgage, in trust for Smith and Burt, their heirs and assigns, to make just and equal the assignment by court of the premises above mentioned to said Delano, and in which Smith and Burt were supposed to be interested; that said Delano took possession of the premises on said April 1, 1865, and continued in possession thereof until June 17, 1878; that, on that date, the Northampton Institution for Savings, a corporation duly established by law and having its place of business in said Northampton, entered upon said land for breach of condition, and for the purpose of foreclosure of a second mortgage from said Delano to said institution for savings, dated February 3, 1870; that said institution for savings, after said entry, continued in the peaceable possession of the land until the mortgage was foreclosed, and until June 16, 1885; that on that date it conveyed the land in fee to the petitioner, and she has since had possession of the same; that the possession of the several owners and occupants of said premises had been continuous and uninterrupted for a period of more than twenty years since the expiration of the time limited in the first-mentioned mortgage for the performance of the conditions thereof, namely, since April 1, 1865; that there had been no one during this period who could lawfully make claim to the payment of said notes, and no payment had been made within twenty years, or at any time, of the debt secured by the first-mentioned mortgage, and no other act had been done by any one of the occupants, in recognition of the valid existence of the mortgage; that the respondent, having been appointed to succeed said Apthorp in said trust, upon the decease of the latter,



was by virtue of said appointment the legal holder and party interested in the mortgage.

The prayer of the petition was, that, after notice to the respondent and to all other parties interested, by publication or otherwise, as might be ordered, the court would order a decree to be entered which should set forth the facts as herein alleged, and the findings of the court in accordance therewith, to the end that said decree might be duly recorded in the registry of deeds, as provided by the St. of 1882, c. 237; and that thereafter no action should be brought by any person to enforce said mortgage.

The case was heard by *Field, J.*, and reported for the consideration of the full court, in substance as follows:

The petitioner proved that the record title of a certain parcel of real estate owned by her in Northampton was encumbered by an undischarged mortgage on two sixth parts thereof, given, by order of the Superior Court, by Charles Delano, on June 20, 1865, to Harrison O. Apthorp, as trustee of Sylvester M. Smith and Charles F. Burt, their heirs and assigns, to secure the payment of the sums found necessary to be paid to make just and equal an assignment by said court to Delano of said undivided two sixth parts, in which Smith and Burt were supposed to be interested. The mortgage contained the following condition: "That whereas the said Delano has, under the order and direction of the Superior Court, given two certain notes of hand for one hundred and fifty dollars each, payable, one to Sylvester M. Smith and his lawful representatives, or bearer, and the other to Charles F. Burt and his lawful representatives, or bearer, with interest, which said notes are given and deposited with said Harrison O. Apthorp, to make just and equal certain partition and assignment of the estate above mentioned, in which said Sylvester M. and Charles F. are supposed to be interested; therefore, if the said Charles Delano, his heirs, executors, or administrators, or either of them, shall well and truly pay to the said Harrison O. Apthorp, in trust as aforesaid, his executors, administrators, or assigns, or either of them, the full contents of the said notes according to the tenor thereof, then the foregoing deed to be void, otherwise to remain in full force."

The petitioner also offered in evidence the record of the assignment of said estate, from which it appeared, among other

things, that said Delano, at the date of his petition for partition, as tenant in common with said Smith and Burt, was seised in fee simple of four undivided sixth parts of the same estate of which said Smith and Burt, as children of one Keziah Burt, were believed to be seised each of one undivided sixth part; that they had been absent for several years previously, and were still absent from the Commonwealth at the date of said partition, and their residence, if living, was unknown; that the remaining heirs of Keziah Burt known to be living and interested in the estate, namely, James M. Smith, Mary A. Babbitt, Maria M. Babbitt, and Sarah A. Horton, had each duly conveyed to Charles Delano all their respective right, title, and interest which they had in the same by their deeds dated and delivered March 20, 1865, and February 6, 1865; that said Smith, Mary A. Babbitt, Maria M. Babbitt, and Sarah A. Horton had, at the same time, so far as in their power, bargained and sold, supposing themselves to be entitled thereto by inheritance, the said shares of their absent brothers, for the sum of \$150 a share, and had agreed that said Delano's notes on demand, each for the sum above mentioned, should be deposited with the said Apthorp in trust and for the benefit of the parties who should ultimately show themselves entitled thereto; that this provisional payment and security were declared to be adequate and ample, and acceptable to all parties known to be in full life and interested in the premises; and that said mortgage was given to secure these notes. The petitioner also proved that Charles Delano and those subsequently having his estate in the premises, namely, the Northampton Institution for Savings and the petitioner, had been in uninterrupted possession of said real estate for twenty years after the expiration of the time limited in the mortgage for the performance of the conditions thereof, namely, from April 1, 1865.

No evidence was offered of any payment on account of the mortgage debt, and the judge found as a fact that it had not been actually paid; nor was evidence offered of any act within twenty years, or at any time, in recognition of its existence as a valid mortgage, except by certain deeds subsequently executed by Charles Delano, in which said mortgage was mentioned as an existing incumbrance. Nor was any evidence offered that said

Smith and Burt, or either of them, had died since the date of said partition, or that any of the remaining heirs of Keziah Burt had succeeded to their interest within said period, or that said Delano had been shown by them to be established and assured in the possession of the estate assigned him.

If the foregoing facts would authorize the court to enter a decree thereon, as prayed for by the petitioner, and as provided by the St. of 1882, c. 237, and if such a decree ought to be entered, then it was to be entered by the court; otherwise, the petition was to be dismissed without prejudice.

*C. G. Delano*, for the petitioner.

*J. A. Wainwright*, for the respondent.

C. ALLEN, J. The petitioner alleges in her petition that no payment has been made, at any time, of the debt secured by the mortgage; and this is also found as a fact in the report. There is no room, therefore, for a presumption of fact to the contrary. *Howland v. Shurtleff*, 2 Met. 26, 28. *Cheever v. Perley*, 11 Allen, 584. At the time of the deeds to Mr. Delano, and of the partition, it was not known who were the owners of two undivided sixth parts of the land, and he sought to obtain a good title thereto in two ways, in view of this uncertainty. In the first place, he took deeds from the four heirs of Keziah Burt who were known to be living, and these deeds were effectual to convey said interests, provided these four grantors had succeeded by inheritance to the interests of their two absent brothers. If Mr. Delano's title should turn out to be valid under these deeds, then, by the agreement made when the notes were given, those four grantors were and still are entitled to the benefit of the notes and the mortgage security. In the second place, Mr. Delano procured an assignment of the two sixths to be made to him by the Superior Court, on his petition for partition. The petitioner now contends that this assignment was invalid; but, if so, she has no standing here, because, independently of the assignment, she does not show that she has a title to the two sixths which she seeks to have cleared of the incumbrance of the mortgage. If, on the other hand, Mr. Delano's title was valid under the assignment, then this furnished a good consideration for his promise to pay the price, and, by the agreement, the notes and mortgage would stand for the benefit of the parties

who should ultimately show themselves entitled thereto. In any aspect of the case, these two sixths have never been paid for, except by the notes and mortgage. The parties who owned them have never alleged the invalidity of the assignment, or sought to recover possession of two sixths of the land, and when they appear or are ascertained, they may not wish to do so. The petitioner cannot now be heard to say that the assignment was invalid, because she claims under it. The notes by their terms were not payable till something should be shown in respect to the title. That has not yet been done, and the condition of the mortgage has not yet been broken.

*Petition dismissed.*

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LUCINDA GAYLORD vs. EBENEZER A. KING.

Hampshire. Sept. 22. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

In 1787, a town appointed a committee to dispose of the highways in the town, or any part thereof. In 1788, the committee reported that they had laid out the old ways of a certain width, and had measured out and bounded the several pieces of land at the front, rear, or sides of each man's lot bounded on the said new surveyed ways, which pieces of land the town would sell to the respective owners of the lots. The town voted to accept the report of the committee; that the tracts of land described "be and hereby are granted in fee to" the persons named; and that, whenever payment should be made, "the town way in each tract respectively should be discontinued." *Held*, that the grant did not pass the fee to the centre of the ways as newly laid out.

The owner of land bordering upon a highway, the fee of which was in the town, petitioned the town to allow him to straighten his fence by extending it a few feet into the highway. A committee appointed by the town reported that the land prayed for would not encroach upon the county way or injure the street, and recommended the town to grant a parcel of land, according to a plan. The town voted to allow the petitioner to enclose a strip of town land in front of his land, on payment of a certain sum, as described in the report of the committee. *Held*, that the grant did not pass the fee to the centre of the way.

The selectmen of a town, by a vote of the town, represented to the county commissioners that the boundary lines of a certain highway had been lost or become uncertain, and prayed that the way be established and determined. The county commissioners, after due proceedings, adjudged that the highway was a certain number of rods wide, and indicated its limits. *Held*, that the town was not estopped by these proceedings from setting up, as against an abutter, a title in fee in the way.

In an action, brought in 1884, for cutting down shade trees, it appeared that they were planted by the plaintiff, in 1866 or 1867, in front of his house, and within the limits of the highway, the fee of which was in the town; and that the defendant was acting under authority from the selectmen of the town. *Held*, that the provision of the Pub. Sts. c. 84, § 6, relating to "shade trees standing," did not apply; and that there was no conclusive presumption of law that the plaintiff had a license to plant them.

**TORT** in two counts. The first count was for removing shade and ornamental trees, the property of the plaintiff, standing in front of her residence in East Street, Amherst. The second count was for breaking and entering the plaintiff's close, and converting the same trees to the defendant's use. Both counts were for the same cause of action. Writ dated September 8, 1884. Answer: 1. A general denial. 2. That the defendant was one of the selectmen of Amherst, who had the care of said street under authority of the town, and who caused the travelled road and path to be widened; that he, acting as highway surveyor and one of the selectmen, and under authority of the board of selectmen, caused the trees to be removed. 3. That Amherst was the owner of the land and soil upon and within which the trees were standing.

Trial in the Superior Court, without a jury, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

It was admitted that the plaintiff owned the premises and residence, in front of which, on East Street, three valuable shade trees had stood for sixteen or seventeen years; and that the defendant, in October, 1883, without notice to or leave from the plaintiff, caused the trees to be taken away by a person, who used them for wood.

The deed to the plaintiff of said premises and residence, in 1854, bounded the same "west on East Street." Ebenezer Mattoon owned the premises in 1789, and, in conveying them in 1830, bounded them "west on East Street." The same premises were conveyed by Mattoon's grantee, and twice subsequently, before the plaintiff took her deed, and were each time bounded "west on," or "westerly by," East Street. There was no other conveyance of the premises between Mattoon's and that to the plaintiff. The only other conveyance of said premises was from Noah Dickinson to Ebenezer Mattoon, dated March 11, 1789, wherein it was bounded "west on a highway."

The trees were planted sixteen or seventeen years before 1883, in the same line with some old shade trees, some of which were two and one half feet in diameter and had become decayed, and they were removed by the plaintiff to set out those in question.

East Street runs north and south; and at the place in question was, when the defendant removed said trees, between one hundred and fifty and one hundred and sixty feet wide. The easterly part of it in front of the plaintiff's premises was a grass plat, in which the trees in question stood, west of which trees was a foot-walk. Westerly of this, a strip was worked for travel. Then an area was grassed over. Then a second strip was worked for travel. Then another grass plat reached to the westerly limit of the highway.

The plaintiff had occupied her premises since 1854, and each year until and including 1883 had mowed the grass plat, on which the old trees and those in question stood, in front of her premises, without objection by, and without asking permission of, any one. There had been a door-yard fence in front of said premises, which had been removed some years before the defendant's acts. It marked the easterly limit of the highway. The trees in question stood westerly of the line of this fence, but considerably east, or on the plaintiff's side, of the centre of the way.

The case was referred to an auditor, who reported that "the plaintiff at the time of setting out the trees in question had no authority or license, either verbal or written, to do the same, from the selectmen, road commissioners, or any municipal officer of Amherst to whom the care of the streets or roads may be entrusted." The report was read at the trial, and there was no other evidence touching the question of license or authority, unless the other facts herein stated may be considered evidence on that point. It was admitted that no objection was made to the planting or maintaining the trees by any officer of Amherst, or by the public, or by any one.

The defendant was a selectman for 1883. The town voted, in March of that year, that the highways and bridges be placed in charge of the selectmen. It also voted a special appropriation of \$200 "for the East Street road," which sum was being expended by the selectmen, who had decided what repairs and alterations to make, and the defendant was entrusted with the

execution of them by his associates. In making such alterations, the easterly travelled track was moved to the east, but within the limits of the highway, and upon the place where said trees had stood which were cut and removed by the direction of the defendant. No other proceedings had been had by the selectmen, or by the town, relative to altering the said way.

On the question of title to the soil within the limits of the highway, to show that it was in the town of Amherst, it appeared that Hadley was incorporated in 1661; that in 1673 its bounds were established as follows: "Bounds shall run from their meeting-house, five miles up the river and five miles down the river and six miles from their meeting-house eastward." The second precinct in Hadley was incorporated in 1759, as the District of Amherst. By the St. of 1785, c. 75, § 9, approved March 23, 1786, all places incorporated by the name of districts before January 1, 1777, were declared to be towns, to every intent and purpose whatever. There was no evidence of any conveyance from Hadley to the district, or to the town of Amherst.

On March 4, 1700, Hadley passed the following votes: "Voted, that three miles and one quarter eastward from the meeting-house, and so from the north side of Mt. Holyoke unto the Mill River, shall lye as common land forever, supposing that this line will take in the whole of the new swamp. Voted, that the rest of the common eastward shall be laid out in three divisions, that is to say, betwixt the road leading to Brookfield and the Mill River, notwithstanding there is liberty for the cutting wood and timber, so long as it lyeth unfenced. There is likewise to be left betwixt every division forty rods for highways. And every one to have a proportion in the first or second division. And every one to have a proportion in the third division; and every householder to have a fifty pound allotment. And all others who are now the proper inhabitants of Hadley, from sixteen years old and upwards, to have a five and twenty pound allotment in said common."

In March, 1745, Hadley voted, that "whenever the town measurers have laid out, according to our order, three divisions of land east of our towne, that we desire the clerk to record said lands in the town's book together, in the same order as they were drawn for by the inhabitants according to the list

presented by said measurer, for the doing of which we will pay what is reasonable out of the town rate."

The third division lies between East Street and the Pelham line. The plaintiff's premises are in said third division, and within the original Hadley, namely, six miles from their meeting-house eastward. East Street is the remainder of one of the old highways.

In November, 1787, Amherst passed the following votes: "Voted, to sell some part of the town highways. Voted, that the highways north and south shall be in no place less than six rods wide, where they are now so wide. Voted, that the committee act discretionary as to the width of the cross highways. Voted, to choose a committee to dispose of said highways, or any part thereof, as they think proper. Voted, that [naming nine persons] be the committee aforesaid."

On January 14, 1788, the said committee reported, at a meeting of the inhabitants, that they had, pursuant to the instructions of the town, laid out and surveyed a town way six rods wide between the first and second divisions; and another, between the second and third divisions, of the same breadth, except that, in the way between the second and third divisions, they had laid out the way but four rods wide from the Bay Road to the north side of Stoughton Dickinson's house lot, and excepting also that in several places the committee had left and reserved the whole breadth of the former way for particular or public use; that the said newly laid ways were within the old town ways, and for the most part contained the county roads.

Said committee also reported that they had laid out ways in the same manner across the divisions from west to east, four rods wide; that they had measured out and bounded the several pieces of land at the front, rear, or sides of each man's lot bounded on the said newly surveyed ways, which pieces of land the town would sell to the respective owners of the lots (if they thought proper); that the committee had also appraised each of said pieces of land according to their best skill and judgment, and exhibited to the town a particular list of their locations and appraisements; that the following exhibition showed the names of the men against whose lands the said pieces of land were laid out for sale, then the quantity of land in acres and rods, the several prices by the acre, and the amount of the lands laid out



for each man to purchase, from the Bay road north, between the second and third divisions:

<i>Owners of Lots and Descriptions.</i>	<i>Quantity of Land.</i>	<i>Price per Acre.</i>	<i>Sums to be Paid.</i>
Jacob Warner, Jr. 8 rods wide, 19 rods long.	152 rods.	£1-0-0	£0-19-0

The report contained one hundred and forty-three pieces, recorded as above. The several sums affixed to the respective names contained in the foregoing list amounted, according to the computation made by the committee, to the sum of five hundred and thirty-three pounds nine shillings and eleven pence, "but there are several former grants included in the foregoing appraisement which the committee could not without difficulty ascertain, and are therefore left to be deducted from the appraisements respectively."

The committee also reported, that the lands left for a way from Leverett bounds to Mill River, and the lands left between Lt. John Dickinson's and Justin Williams's farm in the first division, were not reported by the committee, but were left to be thereafter disposed of by the town as they should think proper.

The town voted to accept the report of the committee, and that the tracts of land laid out and described to the persons respectively named in said report "be and hereby are granted in fee to the said persons and their heirs respectively," on condition that they pay the sums whereat the several tracts were respectively appraised to the town treasurer, or give security; and that, whenever said payment should be made or security given, the town way in each tract respectively should be discontinued, provided that the lands in said report described to (three persons named) be excepted out of the grant, and reserved to the further order of the town. The land relating to the premises now owned by the plaintiff was not one of the pieces excepted in the report or vote.

East Street was by said proceedings narrowed at the place in question, and by a still further narrowing there, hereinafter mentioned, was reduced to its present dimensions. In November, 1809, Ebenezer Mattoon (then owner of the plaintiff's premises) and two others petitioned the selectmen to insert an article in the warrant for the next town-meeting, to see if the town would allow them to straighten their fences on the east side of the

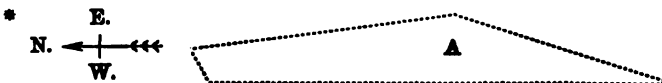
highway, from Mattoon's garden fence to the lane leading to Clapp's house, by extending them a few feet into the highway, and make such order thereon as might be thought proper. At a meeting of the qualified voters, December 7, 1809, it was voted, in pursuance of the third article, on the petition of Ebenezer Mattoon, Esq., and others, praying for an alteration in the highway near his dwelling-house, to choose a committee of three to view the ground where the alteration is prayed for, and report their opinion thereof at a future meeting.

A committee was chosen, who, at the March meeting, 1810, reported that the land prayed for would not encroach upon the county road, nor do any injury to the street; they therefore recommended to the town to grant the petitioners and others therein named the lands in front of their respective lots, which lands were bounded and described in the plan therewith exhibited, a copy of a portion of which is printed in the margin,\* "beginning at the corner of Noah D. Mattoon's fence and running south  $16^{\circ}$  west ninety-four rods, to a post in Lt. Noah Dickinson's fence, a little south of the brook, and appraised the land in front of each man's lot: To Lt. Noah Dickinson, three quarters of a rod, at seventy-five cents; Ebenezer Mattoon, thirteen rods, at \$13." Other sums to three other persons. - The committee also reported that they had gone further in their appraisement of land than the original petitioners expected, but they found it would ornament the street without injury to any, and as people were generally desirous of the measure, they presumed to extend their commission to others as well as the petitioners.

The committee recommended the town to grant the lands described to the persons named in their report, upon the payment of the sums affixed to each person's name.

It was admitted at the trial that said Mattoon's premises were at or about the point marked "A" on the plan, the highway as left being immediately west of the straight line west of it.

At a legal town meeting, held on April 2, 1810, it was voted, in pursuance of an article in the warrant, to accept the report



of the committee appointed at the last December meeting, on the petition of Ebenezer Mattoon, Esq., and others, praying that the town would allow them the privilege of straightening their fence and of enclosing a strip of town land in front of their lands, which report is favorable to the petitioners, and allows them, together with certain other persons therein named, for the sums therein severally expressed, to enclose each a strip of town land in front of their possessions particularly described and laid down in the same report, which report is on file, and is to be considered part of this record, and the lands therein described granted to the several persons therein named. The way was accordingly narrowed.

It appeared that, in June, 1883, the selectmen, by vote of the town, represented to the county commissioners, by their petition, that the boundary lines of East Street had been lost or become uncertain, and prayed them to determine and establish the highway by suitable and permanent monuments. The commissioners accordingly, after due proceedings, adjudged that the highway at the place in question "is laid" a certain ascertained number of rods wide, expressed in their decree, and located permanent bounds to indicate the limits of the highway. The location thus ascertained or determined covered the three grass plats and two worked strips hereinbefore described, and left the place where said trees stood east, or on plaintiff's side, of the centre of the highway.

The plaintiff requested the judge to rule as follows: "1. If the trees in question were planted by the plaintiff, sixteen or seventeen years ago, in the same line with ancient trees which had become decayed, and which were removed for the purpose of planting the new ones in front of her premises, on her side of the centre of the street, between her house and the sidewalk on her side of it, and were kept there, without objection by any officer of Amherst or the public, until removed by the defendant, a license to plant them there would be presumed. 2. If Amherst owned the fee in the soil of the highway forty rods wide in 1787, when it voted to sell some part of the highways, and sold to the plaintiff's predecessor more than half the width of the highway in front of his lot as it then existed, the vote of November 12, 1787, the report of the committee of January 14,

1788, and its acceptance by the town in April, 1788, whereby it granted the same in fee to said predecessor and his heirs, the same would convey the fee to the centre of the highway, and the subsequent conveyances of the lot as thus enlarged, bounding the same on said highway, would convey the fee to the centre to the successive grantees. 3. But if said votes and proceedings did not pass the fee to the centre, and if the fee was still in Amherst thereafter, the vote of April, 1810, granting to Ebenezer Mattoon thirteen rods of land in the highway in front of his land, passed to him the fee to the centre of the road, and the subsequent conveyances of it, through several parties, to the plaintiff, bounding it on said street, passed the fee to the plaintiff. 4. The petition of the selectmen of Amherst, by vote of the town in 1883, setting out that the boundary lines of the highways in question had been lost or become uncertain, praying the commissioners to establish the road, and whereby they obtained an adjudication establishing the way in question covering the locus where the trees stood, estops the town and the defendant in this action from claiming that the town owns the fee in the soil under said road."

The judge refused to give any of said rulings; and found for the defendant. The plaintiff alleged exceptions.

*W. G. Bassett*, for the plaintiff.

*T. G. Spaulding*, for the defendant.

C. ALLEN, J. The first question which we have considered is, whether the plaintiff has shown a title in herself to the soil of that part of the highway where the trees stood; and we think she has not. She relies, primarily, upon the grant by the town in 1788, and upon the rule of law, now well established and familiar, that grants of land bounding on a way will be presumed to extend to the centre of the way, if the grantor owns the soil thereof, and if a clear intention to the contrary is not to be gathered from the language of the deed, construed in the light of the existing circumstances. In the present case, such clear intention to the contrary sufficiently appears. It is assumed, throughout the discussion, that, prior to the proceedings of 1787 and 1788, the town owned the whole street in fee. The street was then wide, and the whole purpose of the proceedings was to narrow it. The land conveyed was not independent land bounding

on the street, but was a part of the street; it is nowhere in the grant itself expressed, in terms, to be bounded on the street or way. Those words are used only in the report made to the town by its committee. We look in vain for any indications of an intention, on the part of the committee or of the town, to change the nature of the title of the town in the soil of the ways as newly laid out. Every presumption is against it. The town was a continuous corporate body, having perpetual succession, and no heirs. Owning the whole street, no reason can be conjectured why, in carrying out its plan of narrowing it, an intention should be inferred to convey the soil to the centre. If in any place the street were narrowed by taking a small strip on each side, and the street should afterwards be discontinued, the construction contended for would lead to the result that the town's title would then be only in separate isolated lots. As a part of the vote granting the land, it was provided that "the town way in each tract respectively should be discontinued;" words which throw a strong light upon the intention and understanding of the parties at the time. On the whole, without at all departing from the general rule for the construction of grants bounding upon a way, it is manifest that the intention of the town was merely to grant the land over which the town way was to be discontinued. See *Phelps v. Webster*, 134 Mass. 17.

The proceedings and votes of the town in 1809 and 1810 afford no ground for inferring an intention to grant the soil to the centre of the street, for reasons which are covered by what has been said in reference to the proceedings and vote of 1787 and 1788.

The plaintiff contends that the town is estopped to deny her title, by reason of the proceedings in 1883; but the town thereby lost no title which it already had to land included in the street. It is quite probable that by far the larger portion of the land included in the highway as laid out by the county commissioners was clearly and without dispute included in the way as already existing, and there is nothing to show that the place where the trees stood was then for the first time taken into the highway. Indeed, it is plain that it was not so. Nor could the proceedings of the commissioners deprive the town of land which it owned in fee. The essential elements of an estoppel are wanting.

It thus appearing that the plaintiff did not own the land on which the trees stood, that portion of the Pub. Sts. c. 54, § 6, reënacting the Gen. Sts. c. 46, § 6, applicable to "shade trees standing," does not apply; and the only remaining question is, whether these trees are shown to have been shade trees planted pursuant to a license or authority of the selectmen, or other proper municipal officer. The plaintiff contends that there is a legal presumption of such license or authority, arising from the facts that they were planted and have remained sixteen or seventeen years without objection, and that she had mowed the grass there for nearly thirty years. Such presumption, in order to be effectual for the plaintiff's purposes, must be a conclusive presumption; since the auditor's report, which there were no facts to control, states explicitly that the plaintiff had no such authority, either verbal or written. But there is no such conclusive legal presumption. The mere absence of expressed objection is not sufficient to meet the requirement of the statute. There must be enough to show, by inference or otherwise, an actual license or authority, which is negated here.

*Exceptions overruled.*

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JOHN B. O'DONNELL, executor, vs. CHARLES SMITH  
& another.

Hampshire. Sept. 22. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

- A conveyance of land in trust "for the benefit of A. for a homestead for his life, and for B. after the said A.'s decease, his heirs and assigns," gives B. a vested remainder in fee, which he can alienate in A.'s lifetime.
- An assignment, under seal, to a town, of a sum of money held in trust for the assignor, purporting to be "in consideration of one dollar and other valuable consideration," and the object of which is expressed to be to repay expenses incurred by the town for the support of the assignor as a pauper, and, if anything is left after paying for past charges, to pay for his support in the future, is valid.
- An assignment of a sum of money will not, after the death of the assignor, be held to be invalid, because, nine years before the execution of the assignment, the assignor was placed under guardianship as a spendthrift, if the person appointed guardian did not accept the office, although the decree of the Probate Court appointing him has not been revoked.

**BILL IN EQUITY**, filed April 29, 1886, by the executor of the will of Thomas O'Keefe, against Charles Smith and the city of Northampton, alleging the following facts:

Thomas O'Keefe, of Northampton, died on June 10, 1884, leaving a will dated June 9, 1881, and by said will disposed of his real and personal estate as follows: After the payment of his just debts and expenses, he gave to Edmund O'Keefe the sum of \$100, and the rest and residue of his estate, real and personal, he gave to his father, Michael O'Keefe. On September 30, 1885, the will was duly admitted to probate, and the plaintiff, named in said will as executor, took upon himself the due execution thereof. At the date of said will, and for some years prior thereto, and until the present time, the only estate to which the will could apply consisted of an equitable reversion in and to a certain fund of about \$350, held in trust by the defendant Smith for Thomas O'Keefe, his heirs and assigns, the fund being the proceeds of the sale of a certain homestead conveyed by deed by one Ansel Wright and another to one Patrick Maloney, "in trust and for the benefit of the said Michael O'Keefe for a homestead for his life, and for the said Thomas O'Keefe, after the said Michael's decease, his heirs and assigns." Said Maloney having deceased, the defendant Smith was duly appointed by the Probate Court in his stead, and has ever since held and invested the fund upon said trust, and paid the income thereof to Michael O'Keefe until his death, in July, 1885.

The defendant Smith has been requested by the plaintiff to pay over the fund to him as executor, as well for the benefit of the estate of Thomas O'Keefe as for the benefit of Edmund O'Keefe, as legatee under the will of said Thomas, and for his further benefit and interest as a creditor of Michael O'Keefe, the residuary legatee of said estate. The fund is sufficient for the payment of the legacies under the will.

The defendant Smith has refused, unless by direction of this court, to pay the fund, as requested, or any part thereof, alleging as a reason therefor that a like demand has been made upon him by the city of Northampton to pay over the fund to said city, and that the city claimed title thereto under and by virtue of a pretended assignment, dated January 11, 1882, made to the town of Northampton, before the incorporation thereof as a city,

whereby said Michael and Thomas O'Keefe assigned and transferred all their right, title, and interest in and to said fund, the same to be applied by the overseers of the town in payment of expenses and charges already incurred, and to be thereafter incurred, for their care and support as paupers; and that the defendant Smith is unwilling to comply with the demand of the city unless he has the direction of this court.

The bill further alleged that the assignment was of no force or validity at law or in equity; first, for want of capacity in the assignors, or either of them, to vary or defeat the terms of said trust; secondly, for want of capacity or authority in the town, as assignee, to take, accept, or hold any fund assigned for the specific purpose mentioned in the assignment; thirdly, for want of consideration for the same; fourthly, because the assignment was not a contract within the scope of the powers conferred by the statute upon towns, or necessary or convenient for the due exercise thereof.

- The prayer of the bill was, that it be decreed that the fund in the hands of the defendant Smith is held by him upon said trusts, and that an account be taken of the amount thereof; that the assignment be held to be of no effect and void; that the defendant Smith pay and transfer to the plaintiff, for the benefit of the estate of Thomas O'Keefe, and of Edmund and Michael O'Keefe as legatees thereof, all of said fund; and for other and further relief.

Annexed to the answer of the city of Northampton was a copy of the assignment referred to in the bill, which was under seal, and the material parts of which were as follows:

"Whereas, by a certain deed, dated July 18th, A. D. 1864, made by Ansel Wright and others to Patrick Maloney, a trust was created as therein set forth for the benefit of Michael O'Keefe and Thomas O'Keefe, both of Northampton;

"And whereas, said Patrick Maloney having deceased, Charles Smith of said Northampton was appointed, by the Probate Court for the county of Hampshire, trustee in the place of said Patrick Maloney, deceased;

"And whereas, said Charles Smith, trustee, has in accordance with a license of said court sold said property described in said deed of trust, and has invested and deposited the proceeds of



said sale in the Northampton Institution for Savings, and the amount of said deposit remaining in said bank is the sum of three hundred and fifty-nine dollars;

“And whereas, said Michael O’Keefe and Thomas O’Keefe, beneficiaries under said trust, have become and are a charge upon the town of Northampton, and are liable to continue a charge upon said town of Northampton in the future:

“Now therefore, in consideration of one dollar and other valuable consideration to us, Michael O’Keefe and Thomas O’Keefe, paid by said town of Northampton, we do hereby transfer, assign, and set over to said town of Northampton all our right, title, and interest in and to said deposit in said savings bank, and hereby authorize and empower said Charles Smith, trustee, to transfer, assign, set over, and pay to said town of Northampton said sum of three hundred and fifty-nine dollars remaining in said bank, to be applied, by the overseers of the poor of said town of Northampton, in payment of expenses and charges already incurred by said town for our care and support, and to be applied so far as said sum will go, if any remains after paying for past expenses and charges, for our support in the future.”

The case was heard by *Field, J.*, and reported for the consideration of the full court, in substance as follows:

Michael O’Keefe died in July, 1885. Thomas O’Keefe died in June, 1884, leaving a will, which has been admitted to probate, and of which the plaintiff is executor.

The substance of the will is set out in the bill. Charles Smith, one of the defendants, holds in his hands \$339.20, which, deducting his costs, he is willing to pay over to the persons entitled to it. The money is the proceeds of real estate conveyed upon trust, as expressed in the will, namely, “in trust and for the benefit of the said Michael O’Keefe for a homestead for his life, and for the said Thomas O’Keefe after the said Michael’s decease, his heirs and assigns.” Both Thomas and Michael O’Keefe had legal settlements in Northampton, and were there supported as paupers, and the sums expended by Northampton for them are as follows: \$357.30 for Thomas, and \$770.70 for Michael.

The judge found, as facts, that, on January 11, 1882, both Michael O’Keefe and Thomas O’Keefe executed the assignment

annexed to the answer of the city of Northampton; that it was delivered to Luke Lyman, chairman of the selectmen of Northampton, who were at that time overseers of the poor for the town of Northampton; that the assignment was executed at Lyman's request; that he was empowered to take it by the board of selectmen and overseers of the poor, who informally authorized him to procure and receive such an assignment; but no action was taken by the inhabitants of the town in reference to it, either before or after it was taken, and it did not appear that the taking of it was ever reported to or known to the inhabitants of the town; and that the assignment was found in the registry of probate, which was the place used for the meetings of the selectmen and overseers of the poor at this time, being the office of Lyman, the chairman, who then was register of probate.

It appeared also, that on January 22, 1873, the selectmen of the town of Northampton petitioned the judge of probate that a guardian might be appointed of the person and estate of Thomas O'Keefe, on the ground that, by excessive drinking, he was wasting his estate, and exposed the town of Northampton to charge and expense for his support; that a citation was duly issued and served on him; that he appeared, and a hearing was had, and on February 8, 1873, a decree was entered, appointing such guardian; and that Lewis B. Edwards, the person appointed guardian, never accepted the appointment, or gave bond, or received letters of guardianship, or entered upon the performance of his trust; but the decree has never been revoked or reversed.

Upon these facts, the case was reserved for the determination of the full court upon the question whether the whole or a part of the money should be paid to the city of Northampton by Charles Smith, or whether it should, in whole or in part, be paid to the plaintiff; such decree to be entered as law and justice might require.

*C. G. Delano*, for the plaintiff.

*T. G. Spaulding*, for the city of Northampton.

HOLMES, J. The trust "for the benefit of the said Michael O'Keefe for a homestead for his life, and for the said Thomas O'Keefe after the said Michael's decease, his heirs and assigns," gave Thomas O'Keefe a vested remainder in fee, and did not

attempt to hamper his power of alienation. He executed a deed of assignment to the town of Northampton, purporting to be "in consideration of one dollar and other valuable consideration." It does not appear that the consideration was not received as stated, and it is presumed that consideration was received in the absence of evidence to the contrary, *Boynton v. Rees*, 8 Pick. 329, if such evidence would be admissible in favor of persons having no better standing than the grantor. *Blodgett v. Hildreth*, 103 Mass. 484, 487. *Mather v. Corliss*, 103 Mass. 568. The deed further purported to be a present conveyance of an interest which could be presently conveyed, and which was conveyed therefore, even if the deed was without consideration, there having been no fraud or duress, unless some illegality is disclosed by the transaction.

The deed shows that its object was to repay expenses incurred by the town for the support of the grantor as a pauper, and, if anything was left after paying for past charges, to pay for his support in the future. We assume that the grantor was not bound to pay for either, and that the selectmen could not bind the town to support him in the future. Still, it was lawful for him to repay the town, if so disposed, and the deed was valid so far as it looked to that end. *Stow v. Sawyer*, 3 Allen, 515, 517. It was equally lawful for him to put funds into the hands of the selectmen for his future support. *Sutton Parish v. Cole*, 3 Pick. 232, 238. *Groveland v. Medford*, 1 Allen, 23, 24. *Webb v. Neal*, 5 Allen, 575. And even if he could have avoided the conveyance, to that extent, the next day, still when the funds or their equivalent had been applied it would have been too late, and in fact he never attempted to avoid it. The selectmen and overseers of the poor, however limited their authority to impose burdens on the town, could accept a gift of funds for its benefit. *Worcester v. Eaton*, 13 Mass. 371, 379.

It is suggested that the grantor was incapacitated from executing this deed in 1882, by a decree passed in 1873, nine years before, appointing a guardian for him as a spendthrift, although the person appointed never qualified or entered upon his duties. Putting the case in the most favorable way for the plaintiff, the question is whether a guardian had been appointed, within the meaning of the Pub. Sts. c. 139, § 9, which makes such

appointment a condition to its avoidance of transfers made by the spendthrift.

There is no incapacity of spendthrifts at common law. *Manson v. Felton*, 13 Pick. 206, 210. *Smith v. Spooner*, 3 Pick. 229. 1 Bl. Com. 305, 306. Nor does the statute so far liken them to insane persons as to create an incapacity, apart from guardianship. The validity of a debt or gift would not be affected by an admission of record that, at the time of contracting the one or making the other, the contractor or donor was a spendthrift, and ought to have been under guardianship.

This being so, it seems to us extravagant to suppose that a decree, which can only operate to declare that the party is a spendthrift and ought to be under guardianship, should indefinitely suspend the power of dealing with his own property, which a person of that sort has by the general principles of law apart from the decree. The immediate ground on which the power is withdrawn from him would not seem to be his condition, but that the power is effectively transferred to somebody else, although his condition is the reason for which the transfer is made.

We assume that, while it was open to the person nominated as guardian to accept the appointment, if the spendthrift had made a transfer, its effect would have been in suspense, and would have been avoided by an acceptance of the guardianship. But when acceptance becomes impossible, as it has by the death of the spendthrift, it becomes impossible that the decree should ever be operative according to its purport and intent, and we think that it should not be allowed a partial operation of a kind never contemplated by the statute. When we add to the foregoing considerations the fact that at the date of the deed nine years had elapsed since the decree, we are of opinion that the person appointed must be taken to have declined the appointment before the deed was made, and thus, for an additional reason, that it cannot be said that a guardian was appointed at that time, even if it would have been in the power of the Probate Court to appoint a new person under the old proceedings after notice, *Allis v. Morton*, 4 Gray, 63, and a new petition would not have been necessary; a proposition which is not entirely clear, in view of the possible change of habits in the interval.

*Decree for the claimant.*

JOHANNA S. ODEWALD *vs.* CHARLES H. WOODSUM.

Hampden. Sept. 28. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ., absent.

At the trial of a complaint under the bastardy act, Pub. Sts. c. 85, if the complainant testifies that the respondent got her with child in a certain month, and the respondent introduces evidence tending to show that, in that month, a third person spent part of an evening with the complainant under circumstances which naturally excite suspicions that they had sexual intercourse with each other, evidence that, in the preceding month, the complainant and such person had an interview under suspicious circumstances, is admissible, within the discretion of the presiding judge.

COMPLAINT under the bastardy act, Pub. Sts. c. 85. At the trial in the Superior Court, before *Knowlton*, J., the jury returned a verdict for the respondent; and the complainant alleged exceptions to the admission of certain evidence, the nature of which appears in the opinion.

*W. H. Brooks*, for the complainant, cited *Eddy v. Gray*, 4 Allen, 435; *Clement v. Kimball*, 98 Mass. 535; *Maloney v. Piper*, 105 Mass. 233.

*G. M. Stearns*, for the respondent.

MORTON, C. J. The complainant testified that the respondent got her with child in October. The respondent introduced evidence tending to show that, in October, one Lawson spent part of an evening with the complainant, under circumstances which naturally excite suspicions of improper relations between them, as bearing upon the question whether Lawson and the complainant then had sexual intercourse with each other. It was competent for the respondent to show the previous relations between them; and, for this purpose, the evidence that, in the preceding September, the complainant and Lawson had an interview under suspicious circumstances, was admissible, within the discretion of the court. *Beers v. Jackman*, 103 Mass. 192.

*Exceptions overruled.*

## PHOENIX INSURANCE COMPANY vs. CHARLES P. FRISSELL.

Hampden. Sept. 28. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ.,  
absent. C. ALLEN, J., did not sit.

In an action by an insurance company against its agent for failure to cancel a policy of insurance, as directed, it appeared that the defendant issued a policy in the plaintiff company upon certain property, containing the provision that "it may also be terminated at any time at the option of this company, on giving written or verbal notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of the policy," and notified the plaintiff of it; that the plaintiff, on the same day, notified the defendant by letter that it declined to take the risk, and directed him to cancel the policy; and that this letter was received by the defendant on the next day. There was evidence tending to show that the defendant could have notified the insured within half an hour after receiving the plaintiff's letter; that the defendant, being also the agent of another insurance company, on that day wrote a policy in that company, which he intended to take the place of the plaintiff's policy, but did not notify the insured of the other policy, or of the cancellation of the plaintiff's policy, and took no steps to effect such cancellation until after the insured property was burned, which occurred five days later. *Held*, that it was competent for the judge, who tried the case without a jury, to find, from this evidence, that the defendant did not exercise that diligence which his duty to the plaintiff required; and that the action could be maintained.

In an action by an insurance company against its agent for failure to cancel a policy, as directed, it appeared that, by the terms of the policy, the plaintiff had sixty days after proofs of loss in which to pay the amount due thereunder; that the writ was dated on the same day upon which the proofs of loss on the insured property were made; and that the loss was paid by the plaintiff before the expiration of sixty days therefrom. It was admitted that the loss was fairly adjusted, and that the plaintiff was liable under its policy for the full amount paid by it. *Held*, that the action was not prematurely brought.

In an action by an insurance company against its agent for failure to cancel a policy, as directed, the evidence tended to show that the defendant took no steps to effect such cancellation for five days after receiving directions to do so, when the insured property was burned. The defendant offered to testify that "orders generally from the companies are to cancel the policy as soon as convenient, and that it is generally understood that an agent has from five to ten days in which to cancel a policy." *Held*, that this evidence was rightly excluded.

**CONTRACT**, with a count in tort, for the failure of the defendant, who was the plaintiff's agent, to cancel a policy of insurance, as directed. Trial in the Superior Court, without a jury, before *Knowlton, J.*, who found for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

*C. A. Birnie*, for the defendant.

*G. Wells*, for the plaintiff.

MORTON, C. J. The plaintiff is a corporation established in the State of Connecticut. The defendant was its agent at Burlington, in the State of Vermont. He issued a policy of insurance to the Shepherd and Morse Lumber Company upon its "dry-house" in Burlington, and, on February 10, 1885, notified the plaintiff of it. The plaintiff on the same day notified the defendant by letter that it declined to take the risk, and directed him to cancel the policy. This letter was received by the defendant on February 11. The policy contained the provision that "it may also be terminated at any time at the option of this company, on giving written or verbal notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of the policy."

Upon receiving the letter of the plaintiff, it was the duty of the defendant to use reasonable diligence in notifying the insured, and in cancelling the policy. Whether he used such diligence is a mixed question of law and fact. There was evidence tending to show that the defendant could have notified the officers of the insured corporation within half an hour after receiving the letter from the plaintiff; that he, being also the agent of the *Ætna* Insurance Company, on said February 11 wrote a policy in that company, which he intended to take the place of the policy of the plaintiff, but did not notify the insured of the *Ætna* policy, or of the cancellation of the plaintiff's policy, and took no steps to effect such cancellation until after the dry-house was burned, which occurred on February 16. It was competent for the justice of the Superior Court, who tried the case without a jury, to find, from this evidence, that the defendant did not exercise that diligence which his duty to the plaintiff required; and we cannot say, as matter of law, that he erred in refusing to rule, as the defendant requested, that the plaintiff could not recover.

The defendant also asked the court to rule that, "inasmuch as, by the terms of the policy, the plaintiff had sixty days after proofs of loss in which to pay the amount due thereunder, the action was prematurely brought." The proof of loss was made on February 28, 1885; the writ was dated on the same day; and the loss was paid by the plaintiff on April 22, 1885. It was admitted that the loss was fairly adjusted, and that the plaintiff was liable under its policy for the full amount paid by

it. At the time the action was brought, the plaintiff had sustained damage by the defendant's negligence, because it had been by his negligence made liable to pay the amount of the loss. A cause of action had then accrued. We are of opinion that the court rightly refused the ruling requested by the defendant.

It is no defence that the company paid the loss within sixty days of the proof. The loss being adjusted, it had the right to pay it within the sixty days if it chose to do so, the provision of the policy that a loss should not be payable until sixty days after the proofs being a provision in favor of the company which it could waive. The defendant was in no way injured by such waiver.

The offer of the defendant to testify that "orders generally from the companies are to cancel the policy as soon as convenient, and that it is generally understood that an agent has from five to ten days in which to cancel a policy," was rightly excluded by the court. It did not amount to an offer to show a general usage which could affect the plaintiff, even if proof of such a usage would be admissible. *Exceptions overruled.*

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CHARLES H. WILLIAMS & another, executors, vs. GEORGE R. WILLIAMS.

Hampden. Sept. 28. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ., absent.

A testator executed three wills, each containing a revocatory clause, and each of which he published and declared to be his last will. At the time he executed the third will, he said he would keep them all until he made up his mind which he wanted to keep, and would then destroy the two he did not want. He afterwards destroyed the first and third wills. *Held*, that these facts would warrant a finding, that the testator, in cancelling the third will, intended to revive the second will, without further evidence of a republication of this will.

APPEAL, by George R. Williams, from a decree of the Probate Court, allowing the will of Theodore Williams. The case was heard, and reported for the consideration of the full court, by Field, J., who found the following facts:



The testator executed three wills, each of which he published and declared to be his last will and testament; and each of them contained a revocatory clause. The third will was made subsequently to the will in contest, which was the second will. At the time the testator executed the third will, he said, "I will keep the three until I make up my mind which I want, and then I will destroy the two I do not want."

All these facts were found upon the testimony of a single witness, whom the judge believed to be accurate and truthful. If the fact of the execution of the third will and its containing a revocatory clause can be established by the oral testimony of a single witness, by the same testimony the entire contents of the third will can be established, as the witness testified to its entire contents.

The testator afterwards destroyed the first and third wills. The will in contest was produced, proved to have been duly executed, and the testator was proved to be of sound mind and of full age. The second will was found eight days before he died, crumpled up on the floor of the water-closet at his home, but under such circumstances that the judge found that there was no intention to destroy it.

There was no evidence that the testator ever republished or revived the second will after the destruction of the will last made, except that above stated; namely, that he said, at the time he executed the third will, that he would keep them all until he made up his mind which he wanted to keep, and would destroy the two wills he did not want, and keep the other, and the fact that the first and third were destroyed, and the second was not.

The judge found that the testator intentionally destroyed the first and third wills, and retained the second, intending to revoke the first and third, and to retain the second as his last will; and affirmed the decree of the Probate Court.

*H. W. Ely & C. F. Ely*, for the appellant. 1. The simple statement made at the time the testator executed the last will, viz. "I will keep the three until I make up my mind which I want, and then I will destroy the two I do not want," and the destruction of the first and third wills, and the finding of the second will as reported, is not sufficient affirmative evidence to

warrant the finding that he intended to revive the second will. 2. The instrument offered for probate is not his last will and testament. The statement made by the testator at the time he executed the last instrument, coupled with the instrument executed, brought all three of the instruments to a common level as unpublished unexecuted wills. A will cannot be executed, and is not properly executed, even if it purports to be, unless the testator unreservedly and unqualifiedly, either by word or deed, publishes it as his last will and testament, as by statute provided. A testator cannot have three last wills and testaments. Being brought to a common level, the destruction of any one of them is a cancellation of all. If he had deceased with the three wills in his possession after the declaration above referred to, he would have died intestate. The report finds that one otherwise intestate may become testate simply by a mental process, without the forms provided by the statutes of this Commonwealth. The case is not analogous to the simple destruction of a will executed without reservation, followed by expression of an intention to revive a former will against which he had said or done nothing except to execute the will since destroyed.

*S. Sanders*, for the executors.

C. ALLEN, J. There was proof, satisfactory to the mind of the justice who heard the case, that the testator, in cancelling his last will, intended to revive the former one which he then left uncanceled; and his conclusion of fact was well warranted by the evidence. Such proof may come from a single witness; *Brown v. Brown*, 8 El. & Bl. 876; *Burns v. Burns*, 4 S. & R. 295; and, being found sufficient to establish the fact, the legal result follows that the former will is thereby revived. See *Pickens v. Davis*, 134 Mass. 252, and authorities there cited; 2 Am. Lead. Cas. (4th ed.) 709, *§ seq.* The fact that the testator executed three wills at different times, all of which were kept by him for a time uncanceled, and that, when he executed the third will, he said that he would keep them all until he made up his mind which he wanted to keep, and would destroy the two he did not want, did not have the legal effect to place the three wills on an equal footing as unexecuted and unpublished wills. The last will, if left unrevoked, would be valid.

*Decree affirmed.*

## GIDEON WELLS, assignee, vs. L. B. WHITE.

Hampden. Sept. 28. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ., absent.

An insolvent, shortly before the beginning of insolvency proceedings, conveyed chattels to another, in consideration of the grantee agreeing to pay certain mortgages upon the property; and afterwards the grantee, being then in possession of the property, obtained an assignment of one of the mortgages, and an indorsement of the note, then overdue. *Held*, that the assignee in insolvency of the grantor could maintain an action, under the Pub. Sts. c. 157, § 98, against the grantee, to recover the value of the property so conveyed, less the amount due on the mortgage.

HOLMES, J. This is an action by an assignee in insolvency, with a count in tort in the nature of trover, and, by amendment, a count under the Pub. Sts. c. 157, § 98, against a person to whom the insolvent had conveyed the chattels in question shortly before the beginning of the insolvency proceedings. The conveyance was made in consideration of the defendant's agreeing to pay certain mortgages upon the property. Afterward, the defendant, being then in possession of the property, obtained an assignment of one of these mortgages, and an indorsement of the note, then overdue.

The only exception not waived is to the refusal of the court to rule, that, "the condition of this mortgage having been broken, and the defendant having, before the date of the writ, taken possession of the property therein described, as assignee of said mortgage, the plaintiff cannot recover for any of such property in this action." The court instructed the jury, that, if the conveyance to the defendant was fraudulent, under the rules given them and not excepted to, the plaintiff was entitled to recover the fair value of the property so conveyed, less the amount due upon any valid mortgages which were upon the property at the time of such conveyance.

We see no reason to doubt that the ruling of the court was a correct interpretation of the section of the insolvent law under which the plaintiff's amended count was drawn. *Wells v. Connable*, 138 Mass. 513, and *Dahill v. Booker*, 140 Mass. 308, refer to trover between mortgagor and mortgagee in possession. But even if there was a valid mortgage outstanding in the hands of

the defendant, if the sale of the equity to him was void as against creditors, the assignee would be entitled to the surplus value of the goods above the amount of the mortgage; *Howe v. Bartlett*, 8 Allen, 20, 21; and there is nothing to show that the action was not maintainable under the statute. It is therefore unnecessary to consider whether the mortgage was or was not merged. *Exceptions overruled.*

*R. O. Dwight*, for the defendant.

*G. Wells*, *pro se*.

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JASON E. STONE vs. ALBERT J. JENKS.

Hampden. Sept. 28. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ., absent.

Under the Pub. Sts. c. 184, § 12, the officer, before serving the writ in an action of replevin, is not required to have the sureties on the replevin bond approved by the defendant, or by a master in chancery; and § 18, providing that the sureties "may be" so approved, does not affect the plaintiff's right to maintain the action in the absence of such approval.

In an action of replevin against an officer, who had attached the chattels replevied as the property of B., it appeared that B. had mortgaged them to A., who subsequently, but before the attachment, took possession of them, with the consent of the mortgagor, but without foreclosure, and that the mortgagor made an oral release or gift to him of the equity of redemption. *Held*, that the judge rightly refused to instruct the jury, as requested by the defendant, that a mortgagor of chattels has an indefeasible right to redeem as between himself and the mortgagee, unless he has parted with such right for some new consideration, or unless the mortgage has been duly foreclosed.

REPLEVIN of a horse, wagon, and harness. Writ dated March 16, 1886. The defendant, a deputy sheriff, justified by virtue of an attachment of the articles in question, on March 15, 1886, on a writ, as the property of one Chauncey Stone.

At the trial in the Superior Court, before *Bacon, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

*S. Sanders*, for the defendant.

*E. H. Lathrop*, for the plaintiff.

HOLMES, J. The bill of exceptions is almost unintelligible. We have construed it to the best of our ability, and, as we construe it, we discover no error in the proceedings.

1. The first question arises on the motion of the defendant to dismiss the action. The first reason suggested for the motion, namely, that the replevied chattels were delivered to the plaintiff before appraisal and after service on the defendant, is not supported by our understanding of the amended return of the officer who served the replevin writ. As we understand it, the officer returns that he took the bond on March 16, summoned the defendant on March 19, had the appraisal on March 24, and on the same day, after the appraisal it is to be presumed, delivered the replevied chattels to the plaintiff.

The only objection open, and the one mainly relied on, is that the sureties on the bond were not approved by the defendant or by a master in chancery. The answer is, that the statute does not require the officer to have the sureties approved, but only to take a bond with sufficient sureties, before serving the writ. Pub. Sts. c. 184, § 12. If, however, the sureties were insufficient, the officer would be liable, at least unless he had exercised a reasonable discretion in deciding upon their sufficiency. *Pomeroy v. Trimper*, 8 Allen, 398, 401, and cases cited. 1 Wms. Saund. 195, n. 3. *Jeffery v. Bastard*, 4 A. & E. 823. *Hindle v. Blades*, 5 Taunt. 225. *Rous v. Patterson*, 16 Vin. Abr. 400 (*Pledges*, H. pl. 4); *S. C. Bull. N. P.* 60. 2 Inst. 340. The statute therefore, having got through with what the officer must do before service, goes on to provide, in § 18, that "sureties on a replevin bond may be approved by the defendant in writing, or by a master in chancery, and, when so approved, the officer who serves the writ shall not be responsible for the sufficiency of such sureties." Plainly this does not impose a new condition upon the plaintiff's right to maintain his action, but is intended to give the officer a way to relieve himself of the liability to which we have referred.

A different question would be raised, if it were alleged, which it is not, that the sureties were insufficient. If their insufficiency would in any case affect the plaintiff's right to maintain his action, which we do not intimate, it may be that the approval of them under § 18 would also relieve the plaintiff from the objection.

2. The plaintiff claimed title as owner, on the ground, as we understand it, that he took possession of the chattels under a

mortgage, with the consent of the mortgagor, but without foreclosure, and that the mortgagor made a parol release or gift to him of the equity. The defendant asked the court to rule that "a mortgagor of chattels has an indefeasible right to redeem as between himself and the mortgagee, unless he has parted with such right for some new consideration, or unless the mortgage has been duly foreclosed."

Assuming the ruling requested to have been pertinent, and to have meant that the mortgagor could not release his right of redemption to the mortgagee except for value, we think that it was wrong, even if confined to a parol transaction, which it was not in terms. Apart from fraud upon creditors, which is not in question, an owner of unincumbered chattels may lawfully give them by parol, if the donee receives or already has possession of them. He may give them with like effect, although subject to a mortgage; and we see no sufficient reason why he may not give them to the mortgagee as well as to anybody else. The objections to attempts to defeat the right of redemption incorporated in the mortgage do not apply with the same force to a subsequent voluntary act. See *Trull v. Skinner*, 17 Pick. 213, 215; *Falis v. Conway Ins. Co.* 7 Allen, 46, 49. And if it should be suggested that the right to redeem, after possession taken for breach of condition, is only an equitable or statutory chose in action, which could not be released by parol, we think the answer is, that the statute, even more plainly than equity, gives the right to redeem, on the footing that the mortgagor still has a title to the property, a *jus in rem*. Pub. Sts. c. 192, §§ 5, 6; c. 161, § 74. If so, the title may be transferred as in other cases.

*Exceptions overruled.*

## FREDERICK E. ROCK vs. INDIAN ORCHARD MILLS.

Hampden. Sept. 29. — Oct. 22, 1886. DEVENS & W. ALLEN, JJ., absent.

In an action by a boy thirteen years old against a corporation for personal injuries sustained, while in the defendant's employ, by getting his hand in a machine called a winder, it appeared that this machine was about four feet and four inches long and two feet and ten inches high, consisting of three smooth steel cylinders, two large ones, with a small one between them on which cotton was wound; that they revolved about fifteen to twenty times a minute; that the gears and pulleys connected with them were covered, but there was no fence or other protection against danger from the other part of the machine; that a machine called a card-grinder stood about four and one third feet from the winder, and the plaintiff, in the course of his work, was required to pass between these machines, but did not work on the winder; and that the plaintiff had been in the defendant's employ three weeks and three days when he was injured. *Held*, that the winder was not a peculiarly dangerous machine; that the defendant was not liable for neglect to fence it; and that, if the defendant sufficiently instructed the plaintiff as to the dangers of the machine, the action could not be maintained.

In an action by a boy against a corporation for personal injuries sustained, while in the defendant's employ, by getting his hand in a certain machine, between which and another machine he was required to pass in doing his work, if it appears that the first-named machine is not peculiarly dangerous, evidence is inadmissible to show that a gate might have been put up at slight expense in front of the machine, or that either machine might as well have been put in another part of the room.

A bill of exceptions stated that, after the charge had been delivered to the jury, the plaintiff excepted to certain portions of the charge, and set forth detached sentences of the charge as those excepted to, and did not give the context. *Held*, that the exceptions could not be sustained, unless it appeared that there was some substantial error which misled the jury.

In an action for personal injuries sustained while in the defendant's employ, the plaintiff's bill of exceptions set forth detached sentences of the judge's charge to which he excepted, one of which was that the question was whether the accident was caused by any act of the defendant, or was the result of want of due care on the part of the plaintiff. *Held*, that the plaintiff had no ground of exception.

In an action for personal injuries sustained by a boy while in the defendant's employ, there was evidence that the injuries were caused by his playing with a machine, on which he was not at work, and which he had been cautioned to keep away from. *Held*, that the plaintiff had no ground of exception to a ruling given to the jury, that, if he was playing with the machine, he could not recover.

In an action for personal injuries sustained by a boy while in the defendant's employ, by his hand coming in contact with a machine, on which he was not at work, but which he was required to pass, the bill of exceptions stated that the plaintiff excepted to certain portions of the judge's charge, and set forth certain detached sentences of the charge as those excepted to. One of these was, that

there was nothing in the nature of the machine which rendered it peculiarly and especially dangerous. The plaintiff did not ask to go to the jury on this question. *Held*, that he had no ground of exception.

TORT for personal injuries sustained by the plaintiff while in the defendant's employ. Answer, a general denial. Trial in the Superior Court, before *Bacon, J.*, who allowed a bill of exceptions, in substance as follows :

The plaintiff introduced evidence tending to show that he, a boy between thirteen and fourteen years of age, was employed by the defendant in its cotton mill as a railway or card boy; that it was a portion of his duties to fix and press up the "hangs," to attend to fifty-six cards, to clean the cards, to stop and start them once every day, when they were stripped, to see that the cotton ran in a continuous, even stream into the railway, so called, and that ends were kept running and the cotton kept smooth, and, whenever the railway or floor in the alleys between the rows of cards became dirty, to clean the same with a broom; that the brooms used for this purpose were kept in the wash-room; that he was instructed by the defendant, to keep close watch of his work, "to keep his eye on it," and to keep his work, the railways, and the floor in the alleys and about the cards clean, and, whenever it was necessary to sweep or clean up, to go to the wash-room and get his broom, that he must go there backwards, so as to keep his work and the card as much as possible in view, that he must back out from the alley in nearly a straight line until he came near a machine called a winder, which was about four feet four inches long and two feet ten inches high, consisting of three steel cylinders, pulleys, belts, frame, &c., that he must then turn, still backing, and pass between said winder and a card-grinder, between said card-grinder and a block for cylinder from the winder, until he arrived at the wash-room door, that, when he arrived at said door, he must seize the broom and hurry back to his cards, and that, when he had completed sweeping, he must return the broom to the wash-room, pursuing the same course and in the same manner as when he went for it; that two of the three steel cylinders of the winder are large, and one is a small one between the others, on which cotton is wound; that the winder was almost constantly in motion; that these cylinders revolved from fifteen to twenty times a



minute, winding on the middle cylinder a large roll of cotton in from three to four minutes, when that was taken out and another cylinder put in its stead, around which the cotton was started; and that the layers of cotton were very thin, and for many revolutions there was hardly a perceptible increase of size of the middle cylinder.

The plaintiff contended, upon this evidence, that the winder was a dangerous machine; that he was never cautioned or instructed in any manner that there was any danger attending his employment or the manner of obtaining the broom, or that any of the machinery was dangerous; and that he was never warned or told to be careful.

There was evidence tending to show that there was no guard, gate, rail, safeguard, or other protection in front of, around, or near said winder, excepting that the gears and pulleys were covered; that the plaintiff was never informed that said winder was dangerous; that about four and one third feet from said winder was a card-grinder, a machine four and two thirds feet long, three feet wide, and three feet high, between which and the winder the plaintiff had to go in order to obtain the broom; that opposite the card-grinder, and three feet and six inches therefrom, and near the winder, was a large wooden stationary block used as the receptacle for the winder cylinder, between which block and the card-grinder the plaintiff had to go, in order to reach the wash-room and obtain the broom; that the foregoing was the only way and the only direction in which to go; that the distance from the doorway of the wash-room to the winder was nine feet, and the distance from the winder to the second card in the row toward the north side of the room was seventeen feet; and that the entire distance from the wash-room door, over the course which the plaintiff was instructed to pursue, was about twenty-six feet.

The plaintiff contended, upon the evidence, that the defendant was negligent in not giving him sufficient and proper instructions how to do this work, and in not giving him any cautions or warnings of the dangers attending his employment, the method and manner of doing his work, and of the dangers of the winder and the other machinery contained in said card-room; that when the plaintiff had been about three weeks and three days in the

employ of the defendant, at about ten o'clock in the forenoon, it became necessary, as a part of his work, to clean and sweep the frames and railways and floor in the alley between the rows of cards; that he started backward from the second card in the row nearest the north wall; that he backed out from the alley in nearly a straight line, until he came near the machine called the winder; that he then turned, still backing (his left hand coming next to the winder), so as to back down to the wash-room and obtain the broom, when, in so turning, his left hand was caught between the cylinders of the winder, which were in motion, and he suffered the injury complained of; that there was no one near the winder to caution or warn him; and that a new roll of cotton had just been started, which had just begun to wind about the middle cylinder.

The plaintiff contended, upon the evidence, that said machine was dangerous; that the manner and course which the plaintiff was instructed to pursue were improper and dangerous. He also introduced evidence that he had never worked in any mill before, and was entirely ignorant of machinery, and of the dangers of the same; that the defendant knew he was entirely inexperienced; that, during his employment, he passed this machine, by said course, some six times a day; and that he had no employment on the machine he was hurt on.

The plaintiff also introduced evidence tending to show that the card-grinder before referred to could have been as well placed in another part of the same room, where there was unoccupied space, and where it could have been used with equal facility, and contended, from said evidence, that, by so placing it, the danger to which he was exposed from the winder, and by which he was injured, would have been done away with. This evidence was objected to by the defendant, but the objection was withdrawn, and the evidence was admitted.

The plaintiff also offered evidence tending to show that a gate could have been constructed, at very slight expense, in front of the winder, with weights, running or sliding on posts or poles, so arranged that it would be very susceptible to the touch, in raising or lowering; that such a gate would not interfere in the slightest degree with the work to be performed upon, near, or by the machine; and that it would obviate the danger a person

would be exposed to in passing the machine in the way in which this plaintiff passed, or in any other way. On objection by the defendant, the judge ruled that this evidence was not admissible; and the plaintiff excepted.

The plaintiff further offered evidence, by another witness, who had worked in the room where the plaintiff was injured, but some time before the plaintiff's employment, and in the same capacity as the plaintiff, that the room was in the same condition then as to the location of machinery, and in every other way, as when the plaintiff was injured; that the said card-grinder could have been placed as well in another part of the room, where there was ample unoccupied space, and where it could have been used with equal facility; and that, by so placing it in another part of the room, the danger to which the plaintiff was exposed from the winder, and by which he was injured, would have been done away with. Upon objection, the judge ruled that this evidence was not admissible, and excluded the same, saying that he should rule in accordance with the cases of *Sullivan v. India Manuf. Co.* 113 Mass. 396, and *Coombs v. New Bedford Cordage Co.* 102 Mass. 572. To this ruling and exclusion of evidence the plaintiff excepted.

The defendant offered evidence from which it contended that the plaintiff was never instructed to go backward, as he stated; that the plaintiff had been warned and cautioned to keep away from this machine repeatedly; and that he was playing with it when he was injured, and not engaged in any duty.

The plaintiff asked the judge to instruct the jury as follows: "1. If the jury are satisfied that the defendant ran the machine on which the plaintiff was injured, in the location it was in at the time of the injury, without fencing or otherwise sufficiently guarding it, so that the plaintiff was exposed while in the defendant's employ to danger, of which it gave no sufficient notice, then the defendant was negligent. 2. If the jury are satisfied that this machine and the card-grinder could as well have been placed in another portion of the room, and that by so doing the plaintiff would have been relieved from risk or danger from the winder, while going to or from the wash-room in the course of his employment, and that the defendant failed so to place it, then the defendant was negligent." The judge refused so to rule.

At the close of the charge to the jury, and before they retired, the plaintiff excepted to the following portions of the judge's charge:

1. "Was that accident caused by any act of the defendant? That is the question and the only question in this case, it seems to me, and it will be for you to determine whether the defendant did any act which caused this injury, or whether it was the result of the negligence and want of due care on the part of the plaintiff."

2. "I think it would be my duty, in case there was no dispute here in the evidence, and it was undisputed that he was then playing with this cotton on the roller, running his hands over it, and calling the attention of others to something, by whistling or anything of that kind, it would be my duty to say that that would be such negligence as would prevent him from being entitled to recover, because it was none of his work, no part of his business, to be there. You have simply then the question to determine what was the fact."

3. "If he was then playing with this cotton on these rolls with his hands, I should instruct you to return a verdict for the defendant."

4. "There was nothing in the nature of this machine which rendered it peculiarly and especially dangerous, except to one who puts his hands on it, and therefore there is not any reason why any fence should be put about it. The fact that there was no fence is not to be assumed by you as a part of the plaintiff's case, because the defendant is not obliged to fence ordinary machinery. It is only such machinery as is specially dangerous that a man is obliged to fence, when some special danger arises from the machinery. Nor does it lie in the mouth of the plaintiff to say that the defendant might, by putting this machinery in a different place from where it was, avoid danger, and therefore it ought to be held in damages by reason of not putting the machinery in the best possible place. It was put there before he entered upon the employment, and he received instructions. Whether those instructions were sufficient or not, is for you to say."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

*W. H. Brooks*, for the plaintiff.

*G. M. Stearns*, for the defendant.

MORTON, C. J. The plaintiff, who is a boy thirteen years old, was injured, while in the employ of the defendant, by getting his hand in a machine called a "winder." This is a machine about four feet and four inches long and two feet and ten inches high, consisting of three smooth steel cylinders, two large ones with a small one between them, on which cotton is wound. They revolve about fifteen to twenty times a minute. The gears and pulleys connected with them were covered, but there was no fence or other protection against danger from the other part of the machine. A machine called a "card-grinder" stood about four and a third feet from the winder, and the plaintiff was required to pass between these machines in doing his work.

The plaintiff had been in the employ of the defendant three weeks and three days when he was injured, and, in the course of his work, had to pass this machine about six times a day; but he did not work on it. It is clear that the winder was not a peculiarly dangerous machine, and that the defendant could not be held liable merely because of a neglect to fence it. *Coombs v. New Bedford Cordage Co.* 102 Mass. 572. *Sullivan v. India Manuf. Co.* 113 Mass. 396.

It was the duty of the defendant to give suitable instructions to the plaintiff, having reference to his age and capacity, so as to enable him to understand the dangers, whatever they were, of the employment in which he was engaged; and, as nothing appears to the contrary, we must assume that the court gave appropriate instructions to the jury upon this point.

The defendant was not required by law to fence this machine, but had the right to use it in the manner in which it did; and, if it sufficiently instructed the plaintiff as to the dangers of the machine, he took the risk of those dangers, and cannot recover because the machinery might have been set up so as to be less dangerous.

The issue before the jury was whether the defendant had given the plaintiff such instructions; and the court rightly rejected evidence offered by the plaintiff to show that a gate might have been put up, at slight expense, in front of the winder, or that the winder or the card-grinder might as well have been put in another part of the room. *Coombs v. New Bedford Cordage Co.*, and *Sullivan v. India Manuf. Co.*, *ubi supra*.

The court also rightly refused the two requests for instructions presented by the plaintiff. Having instructed the jury that the defendant was required to give the plaintiff suitable notice and instructions as to the dangers of the work he was set to do, the court was not obliged to give the first instruction requested in the words of the request, because it implies that the defendant was guilty of negligence if it did not fence the machine, and therefore would mislead the jury; the second request calls for a ruling that the defendant was liable if it could have placed the winder in another part of the room. Neither of the requests could properly be given.

The exceptions taken to the charge of the presiding justice remain to be considered. The bill of exceptions states that, after the charge, the plaintiff excepted to "portions of the judge's charge," and then proceeds to give certain detached sentences of the charge. The context or connection with other parts of the charge is not given, and the plaintiff did not state any reasons for his objections, so as to give the judge the opportunity to correct any accidental inaccuracy in his expressions. Such exceptions ought not to be sustained, unless the plaintiff makes it appear that there is some substantial error in the charge which misled the jury. The first exception is to the statement in the charge, that the question was whether the accident was "caused by any act of the defendant," or was the result of want of due care on the part of the plaintiff.

The plaintiff now argues that this prevented the jury from finding for him, if they found that the accident was caused by the negligent omission of its duty by the defendant. But it is reasonably clear that this is not the fair meaning of the charge. Taken in connection with other instructions which must have been given, the expression "any act of the defendant" was intended and understood as including any act of omission, as well as of commission.

There was evidence tending to show that the plaintiff was carelessly playing with the machine when he was injured; and the second and third parts of the charge objected to are merely statements that, if the jury found this to be the fact, the plaintiff was guilty of contributory negligence, which would prevent him from recovering; and they are not open to objection.

The fourth part objected to states, in substance, that the defendant was not obliged to fence this machine, or to remove it to another part of the room, which, as we have before said, was correct. It was not charging upon the facts to state the self-apparent fact that this machine was not a peculiarly dangerous one. Besides, the plaintiff did not ask to go to the jury upon this point, and cannot now complain that he was deprived of that right.

*Exceptions overruled.*

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COMMONWEALTH vs. CHESTER A. SAWYER & others.

Worcester. October 4. — 22, 1886. DEVENS & W. ALLEN, JJ., absent.

At the trial of an indictment against three persons for assaulting A., a constable and police officer of a certain town, while in the execution of the duties of his office, A. testified that he was appointed a special police officer of the town; that he was patrolling the highway, at the time of the alleged assault, in company with B., another special police officer; that when they arrived at a point opposite the hotel of C., A. was accosted by C., who, after asking the officers if they had any business at his house, struck B., and B. and C. then clinched and engaged in a struggle; that thereupon A. advanced toward the combatants to assist B., when one of the defendants, who had not been seen or heard before, exclaimed, "Hold on there, A., don't strike him;" that, immediately afterwards, another defendant seized A. and held him while the third defendant struck him, and one of the defendants seized A.'s billy, which he had drawn in assisting B.; that each defendant appeared separately, and was recognized by A. as he appeared. A.'s testimony was corroborated by B. There was also evidence tending to show that, among the duties for which A. and B. were appointed, was the surveillance of C.'s house, which was an unlicensed inn and a place of common resort; and that the defendants had lived in the town many years, knew A. and B. well, and were well known by them. The defendants admitted being in the vicinity at the time, but denied assaulting A., or knowing that the person assaulted was an officer. The judge instructed the jury that they might infer from the evidence that the defendants knew that A. was an officer, as alleged in the indictment, and that he was in the lawful execution of his office. *Held*, that the defendants had no ground of exception.

INDICTMENT, against Chester A. Sawyer, William M. Burke, and Ebenezer S. Sawtell, Jr., alleging that the defendants, on July 18, 1886, at Berlin, made an assault upon Appleton D. Parmenter, a constable and police officer of said Berlin, being then and there in the due and lawful execution of the duties of said

office, the defendants well knowing said Parmenter to be such officer and so acting in the execution of the duties of said office.

Trial in the Superior Court, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows:

Appleton D. Parmenter testified that he was a special police officer of the town of Berlin, appointed June 9, 1886; that he was patrolling the highway in said Berlin a little after nine o'clock in the evening of Sunday, July 18, 1886, in company with Leonard W. Brewer, another police officer of said town; that when they were at a point in the highway opposite the hotel of one Sydney I. Liscomb, Parmenter was accosted by Liscomb, and asked if he had business in Liscomb's house, and, before anything further was said, Liscomb, addressing Brewer, said, with an oath, "or you either," and immediately struck Brewer, whereupon Brewer and Liscomb clinched and engaged in a struggle; that thereupon Parmenter advanced toward the combatants to assist Brewer, when the defendant Sawtell, who had not before been seen or heard, exclaimed, "Hold on there, Parmenter, don't strike him;" that, immediately after this exclamation, the defendant Burke pulled Parmenter by the coat collar and held him while the defendant Sawyer struck him, and some one of the defendants seized his billy, which he had drawn in assisting Brewer; that the night was dark and rainy, although a light shone on the scene from the hotel, and the defendants were not seen or heard till they accosted and obstructed Parmenter; and that each defendant appeared separately, and Parmenter recognized each at the time of his appearance.

Leonard W. Brewer testified that he lived in Berlin, and was appointed a special police officer just after Parmenter's appointment, and that he was with him at Liscomb's on the night of July 18, when he was assaulted; and the witness described the assault substantially as testified to by Parmenter.

Arthur A. Staples testified that he was at the post-office in Berlin after the assault, and there heard the defendant Sawtell tell one Moore that he took the billy from Parmenter, and that Burke held Parmenter, and Sawyer struck him.

There was also evidence tending to show that, among the duties for which Parmenter and Brewer were appointed, was the surveillance of Liscomb's house, which, without being a



licensed inn, was a place of common resort; that Sawtell came from said house immediately after Liscomb accosted Brewer, as before stated; and that the defendants had lived in the town many years, knew Parmenter and Brewer well, and were well known by them.

The defendants testified in their own behalf, and offered evidence tending to show that the defendant Burke was elsewhere at the time of the alleged assault. The defendants Sawyer and Sawtell admitted being in the vicinity at the time, but denied assaulting Parmenter, or knowing that the person assaulted was an officer.

In charging the jury, the judge, after defining an assault, and instructing them as to what constituted an assault upon an officer, in a way not excepted to, further ruled that the jury might infer from the evidence that the defendants knew that Parmenter was an officer, as alleged in the indictment, and that he was in the lawful execution of his office; and that the jury might return a verdict of guilty of the full charge.

The jury returned a verdict of not guilty as to Burke, and a verdict of guilty as to Sawyer and Sawtell; and they alleged exceptions.

*J. W. Corcoran & H. Parker*, for the defendants.

*E. J. Sherman*, Attorney General, for the Commonwealth.

GARDNER, J. The bill of exceptions does not state that Appleton D. Parmenter, the officer assaulted, was a constable. The indictment alleges that he was a constable, and, if such officer, he must have been elected at the annual town meeting. Pub. Sts. c. 27, § 78. It appears by the bill of exceptions that he was appointed a special police officer of the town, among other things, for the surveillance of the hotel of Sydney L. Liscomb. If he was a constable, he acquired no additional authority from his appointment as police officer, for such officer may have any or all the powers of a constable except the power of serving civil process. Pub. Sts. c. 27, § 85. If Parmenter was a constable, the jury might infer from the time and manner of his election, and from the fact that the defendants had lived in the town many years, and knew Parmenter and Brewer, and were well known by them, that Parmenter was a constable; and, from the other evidence reported, that he was in the lawful execution of his office.

If Parmenter was not a constable, but was a special police officer, appointed by the selectmen for the performance of special duty, we think that the instructions given to the jury were correct. There was evidence tending to show that the defendants, with Liscomb, were watching for the appearance of Brewer and Parmenter, and that when these officers, in the performance of their duty, came opposite the house of Liscomb, they were assaulted by the defendants, and the billy of Parmenter was wrested from his hands. The acts of the defendants, the manner in which Brewer and Parmenter were accosted, the declarations and admissions of the defendants at the trial, their knowledge of Parmenter, the fact that the house of Liscomb was unlicensed and a place of common resort, and that Parmenter's duty as an officer was to watch it, were facts which were properly submitted to the jury, and from which the jury might infer "that the defendants knew that Parmenter was an officer, as alleged in the indictment, and that he was in the lawful execution of his office." *Commonwealth v. Kennedy*, 136 Mass. 152. *Commonwealth v. Hurley*, 99 Mass. 433. *Exceptions overruled.*

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## COMMONWEALTH vs. JOHN MOLTER.

Worcester. October 4. — 22, 1886. DEVENS & W. ALLEN, JJ., absent.

- At the trial of a complaint for an unlawful sale of intoxicating liquor on a certain Lord's day, a witness testified that, on the day named, he was at a place, over the door of which was the defendant's name, and that he there saw several sales of intoxicating liquor on that day by the defendant behind the bar in a restaurant kept by him; and, on cross-examination, he testified that he could not identify the man behind the bar, or the defendant. A deputy sheriff testified as follows: "The defendant keeps a small hotel and restaurant, with a bar-room in it." *Held*, that there was evidence proper to be submitted to the jury.
- At the trial of a complaint for unlawful sales of intoxicating liquors on the Lord's day, if the defendant has an innholder's license, and a license of the first class for the sale of such liquors to be drunk on the premises, covering the time of the alleged sales, the burden of proof is upon him to show that the persons to whom the sales were made were guests who had resorted to his house for food or lodging.

COMPLAINT for an unlawful sale of intoxicating liquor, at Clinton, on July 4, 1886, the same being the Lord's day, to some person to the complainant unknown. Trial in the Superior Court, on appeal, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows:

The government offered one Kenney as a witness, who testified as follows: "I know a place in Clinton, kept by John Molter, on Main Street; the sign is 'Railroad Restaurant.' Between seven and half-past seven o'clock P. M., on Sunday, July 4, I stopped on the platform of the railroad station, in sight of Molter's place; there are two doors opening into the place of business from the street, one leads into the restaurant, the other to the bar-room; the door to the former was open, people were going in thereat, and I followed. I passed through the restaurant, and into the bar-room. There were a settee and some chairs before the bar, four or five men were in the room, a man was behind the bar, and some one called for lager beer; Molter was behind the bar, he served the liquor, and I saw two payments made. This bar-room faces the street, and the bar comes pretty close to the window; one could see right in from the street, as it was daylight; I saw the bar and fixtures behind the bar, such as bottles and the like; the bar is fifteen feet long; behind the bar are shelves; saw no one come into or go out of the bar-room by the front door; there were quite a number of persons in the restaurant, and four or five in the bar-room. I think the man behind the bar was called John, but I am not positive; this is my impression."

On cross-examination, the witness testified that, in the lower court, he testified that he could not identify the man behind the bar; that he could not now identify him; and that he could not now identify the defendant, or any one in the bar-room or restaurant. He further testified, on cross-examination, as follows: "I saw two different persons make payments. I think there were two or three persons in the bar-room when I went in. I went in with two or three other persons. I could not say which party paid for the beer. As soon as I saw the payments, I went out. No one spoke to me, and I spoke to no one."

Abbot A. Jenkins, a deputy sheriff residing in Clinton, was called by the government, and testified that "John Molter keeps

a small hotel and restaurant, called the Railroad Restaurant; there is a bar-room on the premises, and it is quite a good-sized place."

The government offered in evidence a license of the first class under the Pub. Sts. c. 100, and an innholder's license, to do business at said house, both of which were issued to the defendant on or about May 1, 1886.

The defendant offered no evidence; but requested the judge to rule that, upon the above evidence, the defendant could not be convicted.

The judge declined so to rule; and ruled that there was evidence upon which the defendant might be convicted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*J. W. Corcoran & H. Parker*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

MORTON, C. J. There was evidence tending to show that the defendant sold intoxicating liquor on the Lord's day, as alleged in the complaint. He had a license of the first class under the Pub. Sts. c. 100, and an innholder's license. A deputy sheriff testified that the defendant kept the hotel and restaurant, with a bar-room in it.

One witness testified to seeing several sales of liquor made by the defendant behind the bar. If, on his cross-examination, he contradicted or qualified his statements made upon his direct examination, it was for the jury to say which they believed. There was evidence proper to be submitted to them.

If the defendant relied upon his licenses as a defence, it was for him to show that the persons to whom the sales were made were guests, who resorted to his house for food or lodging. *Commonwealth v. Towle*, 138 Mass. 490. *Exceptions overruled.*

MARY A. OLSON *vs.* CITY OF WORCESTER.

Worcester. October 5.—22, 1886. DEVENS & W. ALLEN, JJ., absent.

In an action against a city for personal injuries occasioned by a defect in a highway, the evidence showed that the defect was a ridge of ice extending over the sidewalk from the outlet of a water conductor upon a building adjacent to the sidewalk, which emptied its water upon the sidewalk, and which had been there for a long time. The judge instructed the jury that they might take into consideration the existence of the conductor, in connection with the time the defect had existed, as bearing upon the question whether the city had notice, or might have had notice, of the defect by the exercise of proper care and diligence. *Held*, that the defendant had no ground of exception.

TORT for personal injuries occasioned to the plaintiff by a defective highway in the city of Worcester. Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows :

The plaintiff offered evidence tending to show that she fell on a ridge or accumulation of ice, extending over the sidewalk from the outlet of a water conductor which reached from the eaves of an adjacent building to the sidewalk, and which emptied its waters on the sidewalk, and had been there a long time ; that it had snowed and rained within two or three days prior to the accident, which happened in the evening ; that it had been wet the previous day, and there was a slight snow on the day of the accident ; and that the weather had grown colder so as to freeze during the latter part of that day and evening. There was also evidence tending to show that the ridge or accumulation of ice had existed for three or four days prior to the time of the accident, substantially as it was at that time.

The judge, among other things, instructed the jury as follows : "It is not enough to show that the city had notice of a spout discharging water there, unless you find, with that, that the city had notice, or might have had notice by the exercise of reasonable care and diligence, of this precise defect, to wit, the ice which was on the sidewalk ; but upon the question whether the city might, by the exercise of such reasonable care and diligence, have had notice of the ice, you may think it very important if there was there a spout calculated to discharge water upon the

sidewalk, and of which you may think the city had notice, or might have had notice by the exercise of reasonable care and diligence."

Upon the defendant's counsel stating that he excepted to this part of the charge, not to any particular expression in it, but to that portion, as a whole, which permitted the jury to consider, upon the question of notice, the existence of the spout, the judge restated the proposition which he intended to lay down, as follows: "You may take into account, concerning it, whatever there was, if anything, which would indicate to the city the probability of an accumulation of ice in a time of storm or in a time of thaw."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

*F. P. Goulding*, for the defendant.

*D. Manning, Jr.*, for the plaintiff, was not called upon.

MORTON, C. J. By the existing statutes, a town or city is liable for an injury caused by a defect in a way, if the injury might have been prevented by reasonable care and diligence on the part of the town or city, and if the town or city had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part. Pub. Sts. c. 52, § 18.

The degree of diligence required of officers of a town or city, in watching the way and guarding against defects, depends in some measure upon the character of the way. If there are known causes in operation likely to produce a defect in the way, the diligence required is greater than might be sufficient under other conditions. It is reasonable that the officers should keep a more watchful eye over such a way in order to guard against danger. When, therefore, a defect is produced by some known, permanent cause which would naturally create the defect, the existence of such cause may properly be considered by the jury in determining whether the officers of the town or city might have had notice of the defect by the exercise of proper care and diligence. *Post v. Boston*, 141 Mass. 189.

In the case at bar, the defect was a ridge of ice extending over the sidewalk from the outlet of a water conductor upon a building adjacent to the sidewalk, which emptied its water upon the

sidewalk, and which had been there for a long time. The conductor was likely to produce the defect complained of; and the court rightly ruled that the jury might take into consideration the existence of the conductor, in connection with the time the defect had existed, as bearing upon the question whether the city had notice, or might have had notice, of the defect by the exercise of proper care and diligence. *Exceptions overruled.*

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EDWARD L. CHAFFEE *vs.* CHARLES A. BLAISDELL.

Worcester. October 6. — 22, 1886. DEVENS & W. ALLEN, JJ., absent.

In an action of replevin for "one Emerson piano, style C, No. 30964," the defendant, from whose possession such a piano was taken on the writ, claimed title as an innocent purchaser from A. The plaintiff offered evidence tending to show that he lent a sum of money to B., who gave him a promissory note therefor. The plaintiff then offered in evidence the following papers: 1. Said note, signed "A. per B., Atty." 2. A writing on the back of the note, by which it was agreed that the plaintiff should "hold the assignment of the lease on piano until this note is paid," and, upon failure to pay the interest, the plaintiff should "take the piano in the lease and sell the piano and apply the proceeds to pay this note," and which was signed "A. per B., Atty." 3. An instrument, signed by C., to whom B. paid the money lent by the plaintiff, and stating that, in consideration of a certain sum paid to him by the plaintiff, C. transferred and assigned to the plaintiff all C.'s "right, title, and interest in and to one Emerson piano, style C, No. 30964, being specified in a certain lease." 4. An instrument, in which goods "hired and received of C." were described as "one Emerson piano, style C, No. 30964;" and which was signed as follows: "Witness my hand and seal. A. per B., Atty." There was no evidence of the existence of any written power of attorney from A. to B. The judge excluded the several papers offered in evidence; and ruled that the evidence introduced was insufficient to make out the plaintiff's case. *Held*, that the plaintiff had no ground of exception.

REPLEVIN of "one Emerson piano, style C, No. 30964." Trial in the Superior Court, without a jury, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff offered evidence tending to show that, on October 2, 1883, one S. K. Elliott obtained from the Boston Loan Company, of which the plaintiff was an officer, \$175, and gave for it a promissory note for that amount, payable to the Boston

Loan Company one month from that date, and signed "Nannie T. Elliott per S. K. Elliott, Atty. under seal." Upon the back of said note was the following agreement, dated October 2, 1883: "It is hereby agreed that E. L. Chaffee shall hold the assignment of the lease on piano until this note is paid, both principal and interest, and if I fail to pay the interest on demand, said Chaffee shall take the piano in the lease and sell the piano and apply the proceeds to pay this note. Nannie T. Elliott per S. K. Elliott, Atty. under seal." Immediately after the \$175 was paid to S. K. Elliott, he went, in company with a representative of the plaintiff, who also represented the Boston Loan Company, to Walbridge Brothers, a firm dealing in furniture and kindred articles in Boston, and paid them the money, and they, at his request, delivered to the plaintiff's representative the following paper: "Oct. 2d, 1883. In consideration of the payment to us of two hundred and fifty dollars by Edward L. Chaffee, we hereby transfer and assign to the said Edward L. Chaffee all our right, title, and interest in and to the following goods, viz.: one Emerson piano, style C, No. 30964, and one piano stool, said goods being those specified in a certain lease dated Feb'y 6, 1883, and numbered 4172. Walbridge Bros."

The plaintiff then called the defendant as a witness, who testified, without contradiction, that the piano taken from him upon the writ in this action was an Emerson piano, No. 30964 and style C, which he bought, in connection with a quantity of furniture, of Nannie T. Elliott, and paid cash for; that she said that she owned it, and that there was no lien or incumbrance upon it; that she was then living in the house with her father, S. K. Elliott, in Milford; and that, when they came to Milford to live, which was in 1884, they brought the piano with them. The plaintiff also introduced evidence that they afterwards went away from Milford, and were last heard from as living in Glens Falls, in the State of New York, in May, 1885; that the plaintiff sent letters to S. K. Elliott about that time, which were not answered, and also sent a messenger to Fitchburg, where they at one time lived after leaving Milford, to find them, and ascertained that they had gone away from there. The plaintiff then offered in evidence the paper referred to as a lease in the assignment from Walbridge Brothers to the plaintiff, which was numbered



4172, and in which the goods were stated to be hired and received of Walbridge Brothers, and were described as "one Emerson piano, style C, No. 30964, one piano stool, one piano cover." This paper was signed as follows: "Witness my hand and seal. Nannie T. Elliott by S. K. Elliott, Atty."

There was no evidence of the existence of any written power of attorney from Nannie T. Elliott to S. K. Elliott. The assignment from Walbridge Brothers to the plaintiff, the note, and the agreement thereon, were admitted in evidence *de bene*, against the defendant's objection. The defendant objected to the admission of the lease from Walbridge Brothers upon grounds similar to those of the previous objections, namely, that there was no evidence that S. K. Elliott had authority from Nannie T. Elliott to act as agent for her in signing any papers or agreements. The judge thereupon sustained the objection; and excluded all the papers as inadmissible to sustain the plaintiff's title or right of possession to the property.

The plaintiff contended, and asked the judge to rule, that, on the evidence of possession of the identical property named in the lease and Nannie T. Elliott's dealings with it, there was a presumption that S. K. Elliott had authority to sign, and, further, a ratification of S. K. Elliott's act in signing the lease; and that, by the assignment from Walbridge Brothers, the plaintiff took all their rights in the piano mentioned in it. The judge declined so to rule; ruled that all the evidence introduced and offered was insufficient to make out the plaintiff's case; and found for the defendant. The plaintiff alleged exceptions.

*C. W. Bartlett*, for the plaintiff. 1. It was a conceded fact at the trial, that the piano in question originally belonged to Walbridge Brothers. No question was made as to this, but it was understood and assumed to be so. A part of the instruction which the plaintiff requested, and which the judge declined to give, was "that, by the assignment from Walbridge Brothers, the plaintiff took all their rights in the piano mentioned in it." As the title to the piano originally was in Walbridge Brothers, and was so conceded to have been, their transfer to the plaintiff clearly operated to convey a good title to the plaintiff, unless in the mean time Walbridge Brothers had made some other disposition of the property, and the judge should have so

ruled. Such subsequent disposition of the property (if any had been made by Walbridge Brothers prior to their conveyance to the plaintiff) it was the duty of the defendant to establish, if he would defeat the title conveyed by Walbridge Brothers to the plaintiff. If there was no competent evidence of the execution and acceptance of the lease of the piano by Walbridge Brothers to Nannie T. Elliott, then there was no competent evidence in the case that Walbridge Brothers had ever parted with any interest in the piano prior to their transfer to the plaintiff; and the title of the plaintiff stood complete, irrespective of said alleged lease. The testimony of the defendant as to the mere hearsay declaration of Nannie T. Elliott that she owned the piano, was clearly incompetent and insufficient to prove title in her, as against the conceded and proved facts in the case.

2. The plaintiff is not to be prejudiced, because, in the opinion of the court below, he failed to do what it was wholly unnecessary for him to do; namely, to show that a lease of the piano had been made to Nannie T. Elliott, and that she had failed to comply with its terms, so that Walbridge Brothers and their assigns stood repossessed of their original title. If the defendant claimed a title to this piano from Nannie T. Elliott, he was bound to show, as against the title proved by the plaintiff derived from Walbridge Brothers, that she had derived from them a title to the property superior to that of the plaintiff.

*G. B. Williams*, for the defendant.

GARDNER, J. The defendant was in possession of the piano at the time it was replevied. He claimed to be an innocent purchaser of the same from one Nannie T. Elliott, who said that she owned the piano. The plaintiff attempted to show title in himself by a transfer and assignment to him by "Walbridge Brothers" of all their right, title, and interest in one "Emerson piano, style C, No. 30964, and one piano stool, specified in a certain lease dated Feb'y 6, 1883, and numbered 4172." The plaintiff failed to show any title in "Walbridge Brothers." He had not shown possession of the piano, and delivery to him. The assignment was inadmissible.

The note given by S. K. Elliott to the Boston Loan Company for \$175, and the indorsement upon the note, were each signed "Nannie T. Elliott per S. K. Elliott, Atty. under seal." The

plaintiff also offered the lease from Walbridge Brothers, signed as follows: "Witness my hand and seal, Nannie T. Elliott by S. K. Elliott, Atty." There was no evidence of the existence of any written power of attorney from Nannie T. Elliott to S. K. Elliott, nor that she knew that he had executed any papers in her name, nor that she had ratified their execution. The possession of the piano by Nannie T. Elliott, and its sale by her to the defendant, would create no presumption of authority in S. K. Elliott to act for her, or of her ratification of his past acts. *Combs v. Scott*, 12 Allen, 493. The several papers purporting to be executed by S. K. Elliott as attorney for Nannie T. Elliott were properly rejected. When these papers were excluded, it is difficult to see what evidence there was in the case, upon which the plaintiff could maintain his action. There was no evidence showing the identity of the piano. The plaintiff failed to show what was meant by "Emerson piano, style C, No. 30964," and there was no evidence by which it could be inferred that there was only one of this kind of piano. The plaintiff failed to prove that the defendant had possession of the identical property claimed by the plaintiff.

After rejecting the written evidence offered, the Superior Court properly refused to give the ruling requested, and rightly ruled that the evidence introduced was insufficient to sustain the plaintiff's case.

*Exceptions overruled.*

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### JAMES TALCOTT vs. ALBERT E. SMITH.

Worcester. October 6. — 22, 1886. DEVENS & W. ALLEN, JJ., absent

A., a manufacturer, had two mills, one of which was run under his own name, and the other under the name of B. He consigned goods to C., a commission merchant, under an agreement that C. should make advances, should sell the goods, and, after deducting his advances, with interest, and his expenses, charges, and commissions, should credit A. with the net proceeds. A. kept the accounts of each mill separate; and he consigned and invoiced the goods to C., who had no knowledge that A. was the sole owner, in the name under which each mill was run. C. brought an action against A., to recover the balance of an account current with the mill run under the name of A., to which the answer was a general denial, and payment. *Held*, that, under the pleadings, A. could not show that

there was a balance due him upon the account in the name of B., which should be allowed in this action, or that there were in C.'s hands goods from the mill run in the name of A., which were not included in the account sued on. *Held, also*, that the expense of printing a part of the goods was properly charged to A., it being shown that this was done under the usage of commission merchants in like cases.

MORTON, C. J. The plaintiff is a commission merchant in New York. The defendant is a manufacturer in this State. He had three mills, one of which was run under his own name, one under the name of F. C. Smith and Company, and one under the name of Chappel Mills.

He consigned goods to the plaintiff under an agreement that the plaintiff should make advances, should sell the goods, and, after deducting his advances, with interest, and his expenses, charges, and commissions, should credit the defendant with the net proceeds. The defendant kept the accounts of each mill separate; he consigned and invoiced the goods to the plaintiff, who had no knowledge that he was the sole owner, in the name under which each mill was run; and the plaintiff kept separate accounts of the consignments from each mill, in the name in which the consignments were made.

This is an action to recover the balance of an account current with the mill run under the name of the defendant. The answer is a general denial, and payment.

At the trial, the defendant offered to prove that a balance was due him upon the account in the name of F. C. Smith and Company, which should be allowed and credited him in this suit. The court ruled that the evidence was not admissible under the pleadings.

It is true that, if the parties had kept but one account between them, it would be competent for the defendant, under his answer of payment, to show that the plaintiff had received money from the sale of goods consigned to him with which he had not credited the defendant in the account in suit. The reason of this is, that, in such case, under his contract, it would be the duty of the plaintiff to apply money, as received, to the credit of the defendant. As he receives the money, the law applies it to the payment of his advances, and a plea of payment is a proper plea.

But, in the case at bar, the defendant saw fit to make separate consignments, and to have separate accounts kept, for each mill.

The arrangement was, in substance, to keep separate the dealings with each mill. This imports that the balances of the three accounts were independent debts. There was no agreement that the proceeds of goods received from one mill should or could be applied in payment of advances made for either of the other mills; on the contrary, the implied agreement is, that the proceeds of the goods of each mill shall be applied only to pay the advances made on its account. Therefore, when the plaintiff received the proceeds of goods consigned in the name of F. C. Smith and Company, the law did not apply them in payment of advances made on account of the goods consigned in the name of Albert E. Smith. The accounts were separate, and the debts resulting from them were independent. Any balance due the defendant on the F. C. Smith and Company account could be availed of by him by way of set-off, but the Superior Court rightly ruled that it could not be shown as payment. The fact that the defendant is in insolvency is not material to the question discussed.

It is still more clear that the court rightly ruled, that, under the pleadings, the defendant could not show that there were in the plaintiff's hands goods from the mill run in the name of the defendant which were not included in the account sued on. Such goods, if not sold, remained the property of the defendant, or his assignee, subject to any lien the plaintiff might have; they cannot in any sense be treated as payment of the advances made by the plaintiff.

The third exception is hardly insisted on. The expense of printing a part of the goods was properly charged to the defendant, it being shown that this was done under the usage of commission merchants in like cases, which usage must be presumed to have entered into and made part of the contract between the parties.

*Exceptions overruled.*

*B. W. Potter & F. W. Blackmer*, for the defendant.

*H. L. Parker*, for the plaintiff.

## VELOUS TAFT, administrator, vs. ELIJAH B. STODDARD.

Worcester. October 6. —22, 1886. DEVENS & W. ALLEN, JJ., absent.  
GARDNER, J., did not sit.

In 1870, A., the owner of land, mortgaged it to D., the condition of the mortgage being the payment of a certain sum of money, on demand, with interest semi-annually, and to secure and save the mortgagee harmless for all indorsements, liabilities, expenses, and services, on account of the mortgagor. In 1878, A. mortgaged a portion of the same land to H., by a deed which referred to the mortgage to D. In 1880, D. assigned the first mortgage to S., the consideration expressed being \$1. On a bill in equity, brought, in 1884, by H. against S., to redeem the land from the first mortgage, it appeared that, in 1867, the firm of which A. was a member executed an assignment for the benefit of their creditors to S. and others, as trustees, by the terms of which certain property (in which that subsequently mortgaged by A. was not included) was to be sold, and the proceeds, after deducting the disbursements, expenses, and charges of the trustees, were to be divided ratably among the creditors of the firm. S. was permitted to testify, against the objection of H., that, at the time of the execution of the first mortgage it was to be held as security for the payment to S. for all the services he had rendered, or should thereafter render, to A. as trustee under the assignment of 1867, or as his attorney, and also for all advances and payments made or to be made, or liabilities incurred, by S. in behalf of A.; that D. did not make any advances to A., or incur any liability for him; and that these facts were all known to H. when he took the second mortgage. The judge found that this testimony was true, and ordered a decree to be entered that S. was entitled to hold the first mortgage as security for money paid out to the creditors of the firm of which A. was a member beyond what he had received from the assets of the firm, for money advanced to A., and for money paid one of his co-trustees for his services, with interest on these amounts; and that he was also entitled to hold it as security for money due him as trustee, or as attorney, without interest, no demand having been made; but that S. was not entitled to be indemnified against any claim of creditors of the firm, the judge having found that S. had fully executed the trust, although there was evidence that a creditor had recently made a demand upon him. *Held*, that the decree was right.

BILL IN EQUITY, filed October 18, 1884, by the administrator of the estate of Whitman Holbrook, to redeem a certain parcel of land in Upton from a mortgage given by Ezekiel B. Stoddard to William Dickinson, and assigned to the defendant.

Hearing, in the Superior Court, before *Aldrich, J.*, who, after a final decree for the plaintiff, reported the case for the determination of this court, in substance as follows:

On February 28, 1870, Ezekiel B. Stoddard conveyed in mortgage, by a deed duly recorded, certain land in Upton to William

Dickinson, the condition of the mortgage being as follows: "Provided, nevertheless, that if the said Ezekiel B. Stoddard, his heirs, executors, or administrators, pay to the said William Dickinson, his heirs, executors, administrators, or assigns, the sum of ten thousand dollars on demand, with interest semiannually at the rate of nine per cent, and secure and save him harmless for all indorsements, liabilities, expenses, and services, on my account or for my benefit and request, together with such sums, if any, as said Dickinson, his executors, administrators, or assigns, or either of them, shall pay for the insurance of said buildings, with lawful interest for the same semiannually, then this deed, as also a certain note bearing even date with these presents, given by said Ezekiel B. Stoddard to the said William Dickinson, to pay the same sum, with interest, at the time aforesaid, shall be void."

The note secured by this mortgage was for \$10,000, payable on demand, with interest semiannually at the rate of nine per cent per annum, and was witnessed.

On March 6, 1878, Ezekiel B. Stoddard conveyed in mortgage, by a deed duly recorded, to Whitman Holbrook, a portion of the premises described in the deed to Dickinson. The deed contained a covenant that the premises were free from all incumbrances except the mortgage to William Dickinson.

On July 16, 1880, William Dickinson, in consideration of one dollar, assigned his mortgage, "the real estate thereby conveyed, and the note and claim secured thereby," to the defendant, by an assignment absolute in form.

Ezekiel B. Stoddard, a relative of the defendant, having been engaged in business in Charleston, South Carolina, with two partners, under the firm and style of E. B. Stoddard and Company, became pecuniarily embarrassed as long ago as 1861, and applied to the defendant to aid him in the settlement of his affairs, which the defendant agreed and undertook to do. In the process of settlement a composition or trust deed was executed, on June 29, 1867, by and between said firm, their creditors, and the defendant and his two co-trustees, by the terms of which certain property, real and personal, but not including that afterwards conveyed by the two mortgages above mentioned, was conveyed by the firm to the trustees, in trust to convert the

same into money, and from the proceeds, after deducting the disbursements and expenses of the trustees, and their reasonable charges for services, to distribute and pay the remainder ratably among the creditors of the firm.

The amount collected by the trustees from the assets of said firm was \$9999.35, all of which was paid to the defendant, and he paid out to the creditors of said firm \$10,186.63, and to one of his co-trustees, for services and expenses, \$700. He also advanced to Ezekiel B. Stoddard \$250, making in all the sum of \$11,136.63, which exceeded the amount he had received from the assets of the firm in the sum of \$1137.28, which, with interest added, amounted, on July 24, 1886, to \$2068.37.

The judge also found there was due the defendant, as trustee, for services, \$500, and as attorney for said Ezekiel B. Stoddard, \$1000, making in all due the defendant from said Ezekiel B. \$3568.37.

The defendant contended that he was the rightful holder of said first-named mortgage as security for the last-named sum, and claimed interest on the sum found due him for services as trustee and attorney; but no demand of payment of that sum having been shown or proved, the judge declined to allow interest thereon.

The defendant was the only witness examined at the hearing, and he was permitted, against the objection of the plaintiff, to testify as to the circumstances and agreements attending the inception of the first-named mortgage, and also as to subsequent agreements respecting the same, and the judge found the following facts proved by the defendant's testimony: There was from one hundred and twenty to one hundred and thirty thousand dollars, debts of the firm of E. B. Stoddard and Company, then known to the trustees, and the sums collected would only pay about five per cent of all claims, as the trustees estimated them, and the creditors were unwilling to accept five per cent in full for their claims; but it was agreed between Ezekiel B. Stoddard and the defendant, that he should buy up such of said claims as could be obtained for twelve and one half per cent, and said mortgage upon the individual estate of Ezekiel B. Stoddard, dated February 28, 1870, was then executed as security and indemnity, as hereinafter stated. Although said mortgage and note were given



to William Dickinson, yet he did not, at the time or afterward, make any advances to or for Ezekiel B., nor did he at any time incur any liability for or on account of Ezekiel B. At the time said mortgage was given, the defendant did not know that he should be able to furnish all the money said mortgagor might need; and if not, Dickinson was to aid him; and, for any advances Dickinson might make for that purpose, he was to hold said mortgage as security. It was also then agreed and understood by said mortgagor, the defendant, and Dickinson, that the mortgage was to be held as security for the benefit of the defendant, and as security for the payment to the defendant for all the services he had rendered for and in behalf of the mortgagor, as trustee or attorney, and for all services he might thereafter perform in either capacity for him, and also for all advances and payments made or to be made, or liabilities incurred, by the defendant, in behalf of said mortgagor.

Before and at the time Whitman Holbrook took the second mortgage, the facts in relation to the origin of the first mortgage, and the manner and purposes in and for which it was given and held, were made known to him, and he took the second mortgage in view of said facts, and with full knowledge of the same, and Holbrook was then told by the defendant that he could not inform him what the exact amount was which would be due to the defendant, but that Holbrook must not take the second mortgage with the understanding that the amount would be less than \$10,000.

It also appeared in evidence, that, after the execution of the deed of trust, some of the creditors of said firm were paid twelve and one half per cent of their claims, while others were paid only five per cent by said trustees, and some were paid nothing. Creditors who were paid twelve and one half per cent received that amount in full satisfaction, and assigned their claims to Dickinson for the defendant; but those who were paid only five per cent received that amount as a dividend, but did not receive it in full satisfaction, and did not surrender their claims, and the defendant has recently been called upon by some creditors of the latter class for an additional dividend, and he claims the right to hold said mortgage, not only as security for the sum found due him as aforesaid, but also to indemnify him for any

liability he may be under to pay an additional dividend to creditors of said firm who have not surrendered their claims and have received only five per cent or less on their claims. No creditor was paid in preference to any other, and there was no evidence or offer of evidence to show that all would not have been paid alike, if they had presented their claims, and accepted payment upon the same terms.

The judge found that the defendant had fully executed the trust assumed by him under and by virtue of said indenture, and that he was not under any liability to any of said creditors, and therefore was not entitled to any indemnity from the plaintiff, by reason of such supposed liability, as a condition of his assigning said mortgage to the plaintiff.

The final decree, dated July 24, 1886, stated that the defendant was entitled to hold the first mortgage as security for the payment to him for his services as trustee and attorney, and for his advances for and in behalf of Ezekiel B. Stoddard, amounting in all, computed as before stated, to the sum of \$3568.37; and that, on payment by the plaintiff, within ninety days, of this sum, with interest from the date of the decree, the defendant should assign said first mortgage and note to the plaintiff.

*T. G. Kent & G. T. Dewey*, for the plaintiff.

*E. B. Stoddard & W. A. Gile*, for the defendant.

MORTON, C. J. This is a bill in equity, brought by the administrator of the estate of a second mortgagee to redeem land from a first mortgage. The first mortgage was originally given by Ezekiel B. Stoddard to one Dickinson, and was afterwards assigned to the defendant. It was, in form, a mortgage to secure the payment of a note for \$10,000. It was proved by oral testimony, at the hearing, that it was, in fact, given for the benefit of the defendant, to secure him for advances which he had made, and which he might thereafter make, for the benefit of the mortgagor in the settlement of his affairs, and for the services rendered by the defendant in such settlement. Dickinson held the mortgage, until he assigned it, in trust for the defendant. *Breen v. Seward*, 11 Gray, 118. We cannot see that the rights and equities of the parties in this suit are different from what they would have been if the mortgage had been originally made directly to the defendant.

It has been repeatedly held by this court, that, on a bill to redeem by a mortgagor, it is competent for the mortgagee to show by oral testimony what was the real debt or obligation which the mortgage was given to secure, and even to show that, after it was given, the parties agreed that it should be held as security for a new and different debt. In such cases, a court of equity will not aid a mortgagor, or permit him to redeem, until he does equity, and pays the debt intended to be secured by the mortgage, according to the agreement and real equities between the parties. *Joslyn v. Wyman*, 5 Allen, 62. *Stone v. Lane*, 10 Allen, 74. *Upton v. South Reading Bank*, 120 Mass. 153. The same principle is applied when a bill to redeem is brought by one who has taken a conveyance from the mortgagor with a knowledge of the facts. *Joslyn v. Wyman*, *ubi supra*. *Stone v. Lane*, *ubi supra*.

In the case at bar, the plaintiff has no higher equity than that of the mortgagor. The second mortgage is expressly made subject to the first, and, when Whitman Holbrook, the plaintiff's intestate, took his mortgage, he was informed of the origin, character, and purposes of the first mortgage. He took it with a knowledge of all the facts. His administrator stands in no better position than the mortgagor; and, in this suit, the defendant is entitled to hold his mortgage as security for the payment of his services and advances, as found by the presiding justice of the Superior Court.

As the defendant never made any demand for the sums claimed for his services, we see no error in the ruling of the Superior Court, that he is not entitled to interest thereon.

The Superior Court has found that the defendant has fully executed the trust assumed by him under the indenture of 1867, and that he is not now under any liability to any of the creditors of E. B. Stoddard and Company under said indenture. It follows that the defendant cannot hold his mortgage as security for an alleged liability which does not exist. The rulings of the Superior Court were correct

*Decree affirmed.*

INHABITANTS OF NORTHBOROUGH vs. CHARLES A. WOOD,  
& another.

Worcester. October 7.—22, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

A. made a promissory note, payable to a town, which was also signed, before delivery, by a firm composed of B. and C. A. held, at the same time, a note of equal amount, signed by B. and C. individually, as an offset for another note of the same amount made by A. to D. for the use of B. and C.; and the money received by B. and C. from the town on the first-named note was paid by them to D. After this A. held the note signed by B. and C. individually as an offset or protection for his liability upon the first-named note; and there was no other consideration for the first-named note between the makers. A. died, and an executor of his will was appointed. A.'s daughter, who was also the wife of B., in settlement with the executor for her share of A.'s estate, made and signed with the other heirs of A. an agreement, by which they released to her all their interest as such heirs in certain real estate, and "also all notes held by A. against B.," and she released to them all her interest in A.'s estate, real and personal. In execution of this agreement, the executor delivered to A.'s daughter the note signed by B. and C. individually, which was received by her as a part of her share of said estate. B. and C. paid interest on the first-named note up to a certain day, when the town made demand upon A.'s executor for payment of the note. Subsequently, two of A.'s heirs, one of whom was the executor, gave to the town their promissory note for the amount of the first-named note, and took from the town treasurer a certificate that it was "given as a guaranty or indemnity" to the town for the first-named note, "which last-named note has been left with" the executor's attorney "for collection," with a stipulation that the makers of the new note were to indemnify the town against the expenses of collection. The town afterwards brought an action on the first-named note against B. and C. The defendants offered to show, by C., that he had paid to A.'s daughter his one half of the note which she received from A.'s executor; and also offered to show, by the plaintiff's treasurer, that he had told the defendants that the note in suit was paid by A.'s executor, and delivered up to him. The treasurer testified that the note in suit was paid him by the executor, and that he surrendered the note and gave up all claim to it. *Held*, that the evidence admitted and excluded showed no equitable defence to the action, within the St. of 1888, c. 228, § 14.

CONTRACT against Charles A. Wood and John F. Wood, co-partners under the firm name of Wood Brothers, as makers of a promissory note for \$500, dated November 21, 1876, payable on demand to the plaintiff, signed by Francis Brigham, and by the defendants in their firm name. Upon the back of the note were indorsements of interest paid each year from December 1, 1876, to July 1, 1883, inclusive. Writ dated October 8, 1883. Answer

1. A general denial. 2. A denial that the plaintiff is the holder or owner of the note. 3. Payment by Francis Brigham, the maker of the note. 4. Payment by the defendants. 5. That the note is owned by the executor of Francis Brigham, and that he has received payment of the note in full from Laura S. Wood, in behalf of the defendants.

Trial in the Superior Court, before *Mason, J.*, who allowed a bill of exceptions in substance as follows :

It appeared at the trial that the note sued on was made by Francis Brigham, who held at the time a note of equal amount, signed by the defendants individually, given September 27, 1876, as an offset or protection for a note of \$500 made by Francis Brigham to one George Q. Sawyer, of the same date, for the defendants' use ; and that the money which the defendants received on the note in suit was by them paid to Sawyer. After this, Brigham held said note signed by the defendants, individually, as an offset or protection for his liability upon the note in suit. There was no other consideration for the note sued on between Brigham and the defendants. Brigham delivered the note sued on, bearing his signature, to the defendants, who, without his knowledge, at the request of the plaintiff, and to conform to the plaintiff's rules, indorsed it before delivery, and received from the plaintiff the money thereon. The defendants paid the interest as expressed by the indorsements on the note in suit.

Francis Brigham died on December 7, 1880, and his son, Rufus H. Brigham, was appointed executor of his will on November 1, 1881. Laura S. Wood, a daughter of Francis Brigham, was the wife of the defendant Charles A. Wood. In settlement with the executor for her share of her father's estate, she made and signed with her three brothers an agreement, by which the brothers released and quitclaimed to her all their interest as heirs at law of Francis Brigham in certain real estate, and "also all notes held by the late Francis Brigham against Charles A. Wood ;" and she, "in consideration of the above," released and quitclaimed to her brothers all her interest in the estate of her father, real and personal. In execution of this agreement, the executor, in the latter part of June, 1883, delivered to her the note signed by the defendants individually, which was taken and received by her as a part of her share of said

estate. No payments had been indorsed on this note, and it was not witnessed. The defendants thereupon paid to the plaintiff interest upon the note in suit up to July 1, 1883, and the plaintiff made demand upon the executor for payment of said note. The executor saw the defendants, and asked what that demand meant, and was told that the settlement with Laura S. Wood settled the whole matter. The executor consulted counsel, and, with his counsel, saw the plaintiff's treasurer. On October 6, 1883, the executor, with his brother, Wilbur F. Brigham, gave their individual note to the plaintiff for \$500, dated October 6, 1883, payable on demand, with interest payable semiannually, and said executor took from Samuel Clark, treasurer of the plaintiff town, a certificate of that date, signed by him, as follows: "This certifies that the note for \$500 signed by Rufus H. Brigham and Wilbur F. Brigham, of Hudson, of this date, payable on demand, with interest semiannually, to the inhabitants of the town of Northborough, or order, is given as a guaranty or indemnity to the said inhabitants for a note of the same amount given by Francis Brigham and Wood Brothers, dated November 21, 1876, payable to said inhabitants on demand, which last-named note has been left with James T. Joslin of Hudson for collection. And it is understood that the inhabitants of the town of Northborough shall be indemnified against any costs or expense in the collection of said note by said Rufus H. Brigham and Wilbur F. Brigham." This certificate was drawn by the counsel of the executor, said Joslin. This action was thereupon begun.

It also appeared that the defendants notified Edmund M. Stowe, who was special administrator of the estate of Francis Brigham, pending a controversy over his will, that said note signed by them individually, and held by Francis Brigham, was held by him as an offset to his liability upon the note to the plaintiff; and that, so long as interest was paid by the defendants on the latter note, no interest was to be collected on said note held by Francis Brigham, and, if the note to the plaintiff was paid by the defendants, said other note was to be surrendered to them. It appeared that said executor had paid interest regularly upon the note given by him and his brother to the plaintiff.

The defendants offered to show, by John F. Wood, that he had paid to Laura S. Wood his one half of said note which

she received from said executor; but the judge excluded the evidence.

The defendants also offered to show, by Samuel Clark, treasurer of the plaintiff, that he had told them that the note in suit was paid by said executor, and delivered up to him; but the judge excluded the evidence. Clark testified, as a witness for the defendants, that the note in suit was paid to him by said executor, that he surrendered said note, and gave up all claim upon it.

Upon this evidence, the judge ruled that the defendants could not maintain their defence; and directed a verdict for the plaintiff for the amount of the note sued on, with interest from July 1, 1883. The defendants alleged exceptions.

*S. Hoar*, for the defendants. 1. The St. of 1883, c. 223, § 14, entitles a defendant in an action at law "to allege as a defence any facts that would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action." When the Legislature first permitted specific equitable defences, as, for instance, in the Rev. Sts. c. 96, § 11, (which is now incorporated in Pub. Sts. c. 168, § 11,) the court gave a full and broad construction to the statutory provision, and allowed the defendant to show, outside of the record, that a person other than the nominal plaintiff was the real plaintiff, and to avail himself of a set-off against him. *Sheldon v. Kendall*, 7 Cush. 217. The same doctrine is applicable to the St. of 1883, c. 223, § 14. *Lee v. Zagury*, 8 Taunt. 114.

2. It was competent in the case at bar for the jury to find that the executor was the real party plaintiff. There was evidence on this point, and it should have been submitted to the jury. As the executor of Francis Brigham has received payment of the collateral note from Laura S. Wood on behalf of the defendants, he is bound in equity and good conscience to apply that fund to the note in suit, and thus relieve the defendants therefrom. He received the fund upon that trust, and in equity the defendants are entitled to be absolutely and unconditionally relieved from his claim upon them for a repayment, whether that claim is a direct or an indirect one.

As the note of the defendants to Francis Brigham was given as collateral security for his liability to the plaintiff town, and

was held by him and his estate as such, the realization upon the security by his executor was, so far as his estate was concerned, a payment to him of the principal debt. *Hunt v. Nevers*, 15 Pick. 500.

3. If the town is the real plaintiff, it has admitted in court that the note is paid, and this admission is at least evidence against it, and to that extent a defence, unless it has parted with its title to the note before the admission, in which case it cannot admit away the title of its assignee; but if the Brigham estate is the assignee of the note, and is the real plaintiff, the proof of payment is plenary against it.

The certificate signed by the treasurer does not show that the collection was to be by suit against the Woods alone, nor against them at all. It was competent for the defendants to show, and evidence was introduced tending to prove, that the plaintiff discharged the defendants, and that the collection was intended to be made by a suit against the estate of Francis Brigham. But the presiding judge ruled that the defendants could not go to the jury on that question. *Foster v. Dawber*, 6 Exch. 889.

The testimony of Clark, and his declarations which were offered in evidence, do not contradict, alter, enlarge, or vary the written certificate of October 6, 1883, because he had the right to treat the transaction as a payment so far as the Woods were concerned, to take an indemnity, and to allow Mr. Joslin to bring suit against the estate of Francis Brigham, if that were a matter of convenience in the settlement of that estate.

The defendants should have been allowed to prove the declarations of Clark to them, because, having been thereby led to pay the note which was held by Francis Brigham's estate, the plaintiff cannot now say that that statement was not true, and that they were not thereby discharged. See language of Lord Denman in *Pickard v. Sears*, 6 A. & E. 469, 474; *Platt v. Squire*, 12 Met. 494; *May v. Gates*, 137 Mass. 389.

As a part of the same transaction the defendants should have been permitted to show the payment by John F. Wood of his part of the collateral note.

4. The defendants' name not being on the note in suit when it was first presented to the plaintiff, the plaintiff must have



known that, whatever was the agreement or understanding between Francis Brigham and the defendants, it was no part of that agreement or understanding that the defendants should become liable to the plaintiff, in any capacity, on said note; on the contrary, it must have known that, whatever the relations of said parties, it was the understanding that Francis Brigham should be the principal and sole debtor. Therefore, when the defendants' name was put upon said note, at the request of the treasurer and without the knowledge of Francis Brigham, the plaintiff knew that it was still the intention of the parties that Francis Brigham should be the principal debtor, and that the defendants' name was put thereon for further security to them, to conform to their rules, and not to relieve Brigham of any part of his liability as maker of said note.

Nothing subsequently occurred to change the relations of the defendants and Francis Brigham to said note, or to lead the plaintiff to suppose that said relations had changed; on the contrary, the fact that the defendants paid interest up to July 1, directly after their note was delivered up to Laura S. Wood, and that the plaintiff thereupon demanded payment from the executor of Francis Brigham's estate, all go to show that the plaintiff ought to have known, and in fact did know, that the defendants' original liability to Francis Brigham's estate, on account of said note, if any, had entirely ceased.

5. It is now well settled that, as the right of a surety does not depend on the contract, but upon the equities arising out of the circumstances of the case, the creditor is affected by the knowledge of the true relations of the debtors, acquired at any time before he does any act which alters the position of the surety, and that, in this Commonwealth, the surety may avail himself of this equity in defence of an action at law. *Guild v. Butler*, 127 Mass. 386, and cases cited. The defendants, therefore, ought to have been allowed to go to the jury on the question of whether they were sureties, and whether the plaintiff knew this fact.

6. It is also well settled that, if a creditor tells a surety that the debt is paid, when, in fact, it is not, and, in consequence thereof, the surety suffers injury, the surety is thereby discharged, even though the creditor is honestly mistaken in the

statement which he makes. *Baker v. Briggs*, 8 Pick. 122. *Harris v. Brooks*, 21 Pick. 195. *Carpenter v. King*, 9 Met. 511.

*J. T. Joslin*, for the plaintiff.

HOLMES, J. The defendants received the money for the note in suit. Francis Brigham received nothing, either from the defendants or from the plaintiff, except that he held a note of the defendants "as an offset or protection for his liability." There can be no pretence that the defendants were sureties of Brigham. *Harris v. Brooks*, 21 Pick. 195. But if we granted that they were sureties, and that sureties might be discharged on some principle of estoppel more readily than a principal debtor, *Carpenter v. King*, 9 Met. 511, *Bragg v. Danielson*, 141 Mass. 195, *Harris v. Brooks, ubi supra*, the evidence offered did not go far enough to make out such a case. It was merely that one of the defendants had paid one half of the note held by Francis Brigham for his protection, and that the plaintiff's treasurer had told the defendants that the note in suit was paid. There was no offer to connect the two facts. It does not even appear that the defendant did not pay before the statement was made.

Brigham having died, two of his sons, one of whom was his executor, gave the plaintiff their note for \$500, and took from the town treasurer a certificate that it was "given as a guaranty or indemnity" to the town for the note in suit, "which last named note has been left with James T. Joslin," (the executor's attorney,) "for collection," with a stipulation that the two sons were to indemnify the town against the expenses of collection. Under the circumstances, this plainly imported that the old note was to be put in suit against the defendants, and that the note signed by Brigham's sons was only given as security. And the bargain having been reduced to writing when it was made, the treasurer's certificate could not be overridden by his testimony that the note in suit was paid by the executor, and surrendered to him, it being plain, and having been assumed in argument, that the testimony was simply a version of this same transaction.

In view of the last-mentioned fact, it is improbable that the testimony was intended to qualify or contradict the certificate, or that it really meant anything more than that the executor of Francis Brigham, by reason of the original and collateral notes,

was the person practically most interested in the present suit. At all events, we see no ground for the suggestion that the executor of Brigham is the real plaintiff in a legal sense, or for doubting that the town remained the equitable, as well as the legal, owner of the note declared on. This being so, (even if the necessary parties were before the court,) the equities between the executor and the defendants cannot be considered in this case.

*Exceptions overruled.*

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JAMES BAXTER *vs.* JOHN DOE & another.

THOMAS NEWMAN *vs.* SAME.

JOHN LAURELL *vs.* SAME.

Suffolk. March 3. — October 23, 1886.

The St. of 30 & 31 Vict. c. 124, § 7, provides that, if a seaman who is ill has not, through the neglect of the master or owner, been provided with proper food, or water, or anti-scorbutics, the master or owner shall be liable to pay all expenses properly and necessarily incurred by reason of such illness (not exceeding in the whole three months' wages) by the seaman, but that this "shall not operate so as to affect any further liability of any such owner or master for such neglect, or any remedy which any seaman already possesses." *Held*, that this statute did not take away the right of a seaman to maintain an action against the owners of the vessel for injuries sustained, to a greater amount than three months' wages, by reason of the failure of the master to furnish proper food and anti-scorbutics, as provided for in the shipping articles.

In an action by a seaman against the owners of a vessel for injuries caused by the neglect of the master to furnish suitable provisions and anti-scorbutics, as required by the shipping articles, evidence of the similar sickness, under the same conditions, of others of the crew on board the vessel about the time of the plaintiff's sickness, is admissible.

A seaman, who has shipped on an English vessel under articles sanctioned by the Board of Trade in pursuance of the St. of 17 & 18 Vict. c. 104, and which require the supplying of specified provisions and anti-scorbutics to the crew during the voyage, may maintain an action against the owners of the vessel for injuries caused by the neglect of the master to comply with such requirements.

The writ in an action by a seaman described the defendants by the fictitious names of "John Doe and Richard Roe, owners" of a certain vessel. The vessel was attached, and the writ was served on the master of the vessel, who gave bond with sureties to release the vessel from attachment. No change in ownership occurred while the vessel was on the voyage during which the cause of action arose, up to the time of the attachment. An appearance by counsel was entered

for the defendants, and an answer filed. At the trial, the judge was asked to rule that the plaintiff must show the ownership of the vessel by the defendants, as alleged in the writ. *Held*, that the ruling requested was rightly refused.

GARDNER, J. In each of these actions, the plaintiff claims damages of the defendants, for the neglect to furnish him with proper and suitable food, provisions, care, and treatment, during a voyage on the ship *Earl Granville*, upon which he shipped as an able-bodied seaman. The defendants contend that, although the master of the ship may be liable for such negligence, the owners are not responsible. By reason of the shipment, the relation of seamen to the master, to the owners, and to the ship is, under the maritime law, peculiar. The contract they enter into may be enforced to recover wages against the owner, the master, or the vessel. *Temple v. Turner*, 123 Mass. 125. *Smith v. Oakes*, 141 Mass. 451. The general obligations of the contract of shipment are, that the owner and master shall provide for the subsistence of the mariners, during the time of the continuance of the contract, in such manner, and with such provisions, as the positive law of their country enjoins. *Curtis on Merchant Seamen*, 27. *Foster v. Sampson*, 1 Sprague, 182. But such a statutory provision does not, unless it points out the remedy and allows this remedy only, prevent the recourse by seamen to their right of bringing suit for damages sustained by them from the wilful or negligent conduct of the master or owners. *Couch v. Steel*, 3 El. & Bl. 402. *Collins v. Wheeler*, 1 Sprague, 188.

In the cases at bar, the plaintiffs did not rely upon the necessary presumption of the maritime law growing out of the relation of seaman to shipowner, but they relied upon direct evidence showing a statutory duty on the part of shipowners to furnish provisions and anti-scorbutics to the crew. The vessel was an English ship, and the shipping articles which the plaintiffs signed were "regular English articles," sanctioned by the Board of Trade in pursuance of the English statute law (17 & 18 Vict. c. 104). All the parties agreed that the cases were governed by the English law, and they were tried upon this agreement.

The English statutes were put in evidence, and in the shipping articles the provisions for each day of the week were stated, with this heading: "Scale of provisions to be allowed

and served out to the crew during the voyage, in addition to the daily use of lime and lemon juice and sugar, or other anti-scorbutics, in any case required by law." This made the English statutes applicable to the vessel and crew, by express contract in the shipping articles, so far as they required the use of lime and lemon juice and sugar, or other anti-scorbutics.

The Merchant Shipping Act of 1854, (17 & 18 Vict. *c.* 104, § 109,) put in evidence, provides that the requirement as to provisions, health, and accommodations of seamen shall apply to all ships registered in any of her Majesty's dominions abroad, when such ships are out of the jurisdiction of their respective governments, and to the owners, masters, and crews of such ships, and to all ships registered in any British possessions. The Merchant Shipping Act of 1867 (30 & 31 Vict. *c.* 124, § 4, *cl.* 5) provides that so soon as the crew have been at sea for ten days, and during the remainder of the voyage, the master shall serve out lime or lemon juice daily to the crew, at the rate of an ounce each day to each member of the crew. Section 7 provides that, if a seaman who is ill has not, through the neglect of the master or owner, been provided with proper food, or water, or with anti-scorbutics, the master or owner shall be liable to pay all expenses properly and necessarily incurred by reason of such illness (not exceeding in the whole three months' wages) either by the seaman or by certain public officers mentioned; but that this "shall not operate so as to affect any further liability of any such owner or master for such neglect, or any remedy which any seaman already possesses."

Under these statutes, we are of opinion that there was evidence that it was the duty of the master or owners to furnish and supply the ship with suitable and wholesome provisions, and with lime or lemon juice for the voyage; and that it was the duty of the master to serve such provisions, and also such lime or lemon juice, to the plaintiffs during the voyage. The evidence tends to show that there was a breach of this duty on the part of the master; that no lime or lemon juice, or any anti-scorbutics, were served to the crew until the ship had been out one hundred and twelve days, except during about three weeks, when they had once a week, for six men, about a pint of bad vinegar, unfit for use.

The defendants asked the court to instruct the jury that the owners were not liable for the master's default, which request was refused. The owner is responsible for the direct consequences of any wrongdoing of the master, which is done by him as master, in the discharge of his duty, and under the authority given him as master. *Sheffield v. Page*, 1 Sprague, 285. *Hunt v. Colburn*, 1 Sprague, 215. *Foster v. Sampson*, *ubi supra*. 2 Pars. Ship. & Adm. 29. The contract between the plaintiffs and the master was in fact made between the plaintiffs and the owners. The master was the owners' agent in making such contract. "If it was broken by the wrongful act of their authorized agent, they are bound to make compensation for such breach to the party injured." *Croucher v. Oakman*, 3 Allen, 185. The instruction requested was properly refused.

The court admitted evidence, against the defendants' objection, of the similar sickness of others of the crew, on board the ship, about the same time that the plaintiffs were sick. It is difficult to find a case where all the conditions and circumstances affecting all the crew were so similar. As suggested by the plaintiffs in their argument, the crew lived together in the same quarters, on the same vessel, for the same length of time, worked in the same employment, were subjected to the same climatic influences, hardships, deprivations, and manner of life, partook of the same food at substantially the same time, were deprived of anti-scorbutics for the same length of time, and, of the crew of twelve, eight were affected at about the same time with the same symptoms of disease. This evidence presented but one issue to the jury, excluded all separate and collateral issues, and tended directly to prove that the provisions served to the crew were unsuitable and insufficient, and that the sickness was occasioned by the want of anti scorbutics. Upon the offer of proof made, the Superior Court was justified in admitting the testimony. *Eidt v. Cutter*, 127 Mass. 522. *Hawks v. Charlemont*, 110 Mass. 110. *Lincoln v. Taunton Copper Co.* 9 Allen, 181.

The writ in each case described the defendants by the names of "John Doe and Richard Roe, owners of the ship Earl Granville," and was served on the master of the ship. The master gave bond with sureties to release the attachment on the ship. The defendants or the owners appeared by counsel, and denied

each and every allegation in the plaintiff's writ and declaration contained, and more particularly specified several defences. The bill of exceptions states that "these suits were begun against the defendants, under the fictitious names of John Doe and Richard Roe. . . . It was not contended that there had been any change in the ownership of said vessel while on said voyage up to the time she was attached."

From the commencement of these several actions to the argument of this bill of exceptions, they have been defended by counsel. None but the true owners could have appeared, and no others would have had any interest to appear. It must be assumed, as a conceded fact, that the true owners of the ship have defended these actions. The cases have been tried with great persistency, and no objection has been made by the owners that they were described in the writs by the recognized fictitious names of John Doe and Richard Roe. There could have been no misunderstanding by the real owners, that the names set out in the writs were not the true names of the real owners.

"When the name of a defendant is not known to the plaintiff, the writ may be issued against him by a fictitious name, and, if duly served, shall not be abated for that cause, but may be amended on such terms as the court deems reasonable." Pub. Sts. c. 161, § 20. Under this statute, when a fictitious name is inserted in a writ, it should be alleged, in some form, that the name is fictitious, and so used because the real name of the defendant is unknown. The statutory requirement would thus appear upon the record, and the allegation under the statute would be a sufficient answer to a plea in abatement. No such pleas were filed in these cases. We need not inquire whether the writs were duly served, because the defendants voluntarily appeared in court, submitted to its jurisdiction, and filed answers to the plaintiffs' declarations.

We have then the case of the plaintiffs' bringing themselves within the terms and provisions of the statute, and being rightly in court. There is no question of jurisdiction, either of parties or of subject matter. The true owners of the ship appear, and set out in their answers their defences. The cases are fully tried upon their merits, and the defendants ask the court to rule, "that the plaintiffs must show the ownership by these defendants of

the ship Earl Granville, as alleged in their writs. As there is no evidence of such ownership in these cases, the verdict must be for the defendants." The proposition to require proof that fictitious persons were the actual owners of the ship, is absurd. We do not think that the court should have ruled, under all the circumstances of the trial, that it was necessary for the plaintiffs to prove the ownership of the ship Earl Granville by John Doe and Richard Roe, as alleged in their writs. It was not requisite that the plaintiffs should prove that the fictitious persons named as owners were the actual owners of the ship. Whether other rulings should have been given, if proper requests therefor had been made, we are not called upon to determine.

*Exceptions overruled.*

*J. M. Browne*, for the defendants.

*C. T. Russell, Jr.*, (*S. W. Trowbridge* with him,) for the plaintiffs.



SHOE AND LEATHER NATIONAL BANK vs. GEORGE F. WOOD  
& another.

Suffolk. March 4. — Oct. 23, 1886. W. ALLEN & HOLMES, JJ., absent.

A promissory note, made and signed in another State, and payable there, although sent by mail to the payee in this Commonwealth, is executed in, and to be governed by the law of, the other State.

Under the Gen. Sts. of Kentucky, c. 22, §§ 6, 21, promissory notes, though negotiable in form, are subject, in the hands of an indorsee, to any defence the maker has against the payee before notice of the transfer.

If the sole consideration of a promissory note, which is not negotiable by the law of the State where it is made and is payable, is an agreement to deliver certain goods, and the payee fails in business and is unable to deliver a portion of the goods, in an action upon the note, by an indorsee against the maker, in this Commonwealth, failure of consideration may be set up in defence thereto.

In an action against the maker of a non-negotiable promissory note, by a bank which had discounted the note for the payees, the defence was failure of consideration owing to the neglect of the payees to send to the maker certain goods. The plaintiff offered to show that the money obtained by the discount of the note was applied by a special partner of the payees to the payment of another note of the same maker, and payable to a firm composed of said special partner and one of the payees of the note in suit. *Held*, that the evidence was rightly excluded.



It is not contrary to the provisions of the Constitution of the United States for a State to enact a statute giving the maker of a negotiable promissory note the same defence as against an indorsee that he has against the payee, if the note is made in such State and is payable there.

Where the evidence of a foreign law consists entirely of a statute, the question of its construction and effect is for the court.

CONTRACT, against George F. Wood and William C. Caye, upon three promissory notes, each dated at Louisville, Kentucky, in May, 1883, payable six months after date to the order of Macomber and Greenwood, at the Kentucky National Bank, signed by the defendants in the firm name of George F. Wood and Company, and indorsed by the payees. The answer set up failure of consideration, and that the notes were governed by the law of Kentucky.

Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions in substance as follows:

The plaintiff is a national bank, organized under the United States banking laws, and located at Boston, Massachusetts. The defendants are members of the firm of George F. Wood and Company. Both the defendants reside at Louisville, Kentucky, and carry on business there as auctioneers and commission merchants. The Kentucky National Bank is a bank organized in Kentucky, under the banking law of the United States.

The firm of Wallace and Macomber was composed of George Wallace and G. B. Macomber, and carried on the boot and shoe business in Boston for a number of years, but it dissolved in the early part of 1883, and was succeeded by the firm of Macomber and Greenwood, composed of the said G. B. Macomber and A. Greenwood, as general partners, and the said George Wallace, as special partner.

There was evidence tending to show that, before the making of the notes in suit, Wallace and Macomber had received three notes signed by the defendants, amounting in all to the sum of \$5667.15, which had been discounted by the plaintiff bank for Wallace and Macomber, and fell due on several dates in June, 1883; that Wallace and Macomber had sent out certain goods to the defendants to be sold, the proceeds to be applied towards paying the notes, but, the proceeds not being sufficient for that purpose, the defendants, in June, drew on Wallace and Macomber for several thousand dollars with which to pay said notes, and

said drafts were honored and said notes paid thereby; that in June, 1883, G. B. Macomber wrote to the defendants from Boston, that there were some goods on hand belonging to Wallace and Macomber, of which Wallace had control; that Wallace was settling the affairs of the old concern and wished some notes; and that he would forward the goods when the time came.

Three notes, corresponding in every respect with the three in suit, except that the payees were Wallace and Macomber, were sent by the defendants from Louisville, by mail, to Macomber, in response to his letter. Macomber then returned these notes, saying he did not wish to indorse them, as the concern had dissolved, and requesting that they be made payable to the order of Macomber and Greenwood.

The notes in suit were then made and signed by the defendants in Louisville, and mailed to Macomber and Greenwood, in Boston, and by them received; and one of them, to the amount of \$1624.22, was discounted by the plaintiff bank for Macomber and Greenwood, at six per cent, and passed to their credit, on June 19, 1883, they keeping an account with the plaintiff bank. The other two notes were discounted by the plaintiff bank for Macomber and Greenwood on June 29, 1883, at six per cent, and passed to their credit.

Wallace and the firm of Macomber and Greenwood subsequently sent to the defendants, to be sold, a part of the goods, in accordance with their agreement, the net proceeds of which amounted to but \$1128.07, which the defendants have paid on account of said notes.

In August, 1883, Macomber and Greenwood failed, and were unable to deliver the remainder of the goods to meet said notes, although the defendants were ready to receive them; and the defendants were informed of said failure, and were informed some thirty days before the notes in suit fell due that the said notes had been discounted by the plaintiff bank.

So far as the evidence admitted by the court went, the sole consideration of said notes was the agreement to deliver said goods, and if the defendants had paid said notes according to their tenor, there would have been due to the defendants from Macomber and Greenwood the amount sought to be recovered in this action.

The plaintiff offered to prove that Macomber and Greenwood, in June, 1883, on the days of the discount of the notes in suit, or the days following, furnished to Wallace the amount of discount of these notes, to enable Wallace to take up for the defendants their notes that fell due in said June, which had been discounted by the plaintiff bank for Wallace and Macomber, and that said money was never repaid. The judge refused to admit this evidence.

The defendants offered in evidence the following statutes as the law of the State of Kentucky :

"All bonds, bills, or notes for money or property shall be assignable so as to vest the right of action in the assignee; but except in case of bills of exchange, not to impair the right to any defence, discount, or offset that the defendant has and might have used against the original obligee or any intermediate assignor, before notice of the assignment." Gen. Sts. of Kentucky, c. 22, § 6.

"Promissory notes, payable to any person or persons, or to a corporation, and payable and negotiable at any bank incorporated under any law of this Commonwealth, or organized in this Commonwealth under any law of the United States, which shall be indorsed to, and discounted by, the bank at which the same is payable, or by any other of the banks in this Commonwealth, as above specified, shall be, and they are hereby, placed on the same footing as foreign bills of exchange." Gen. Sts. of Kentucky, c. 22, § 21.

The defendants contended that the notes signed and payable in Kentucky, and mailed in Kentucky by the defendants to Macomber and Greenwood in Massachusetts, were governed by the laws of the State of Kentucky, and the judge so ruled; the plaintiff contending that said notes were governed by the laws of Massachusetts, and that said statutes of Kentucky were in contravention of public policy, and in violation of the Constitution of the United States, and were not applicable to a national bank organized under the laws of the United States, and should not be enforced by a Massachusetts court.

At the close of the evidence, the judge, at the request of the defendants, ruled, on the whole evidence and offers of proof, that there was no consideration for these notes, except for

\$1128.07, which had been paid; and ordered a verdict for the defendants. The plaintiff alleged exceptions.

*H. D. Hyde*, for the plaintiff.

*A. Hemenway & D. F. Kimball*, for the defendants.

GARDNER, J. 1. The plaintiff contends that the notes in suit were made in Massachusetts, and that the laws of this State are to govern the contracts. The defendants, the makers of the notes, resided in Kentucky. They made and signed the notes at Louisville in that State, and then sent them by mail to the payees in Massachusetts. By their terms, they were payable at the Kentucky National Bank, a bank organized in Kentucky under the banking law of the United States.

Under our decisions, these various circumstances determine the place where the contract was executed, and where it was to be consummated. It was clearly a Kentucky contract, and is to be governed by the laws of that Commonwealth. *Pine v. Smith*, 11 Gray, 38. *Carnegie v. Morrison*, 2 Met. 381. *Orcutt v. Nelson*, 1 Gray, 536. *Milliken v. Pratt*, 125 Mass. 374.

2. The defendants put in evidence the Gen. Sta. of Kentucky c. 22, §§ 6, 21, which are set forth in the exceptions. At the argument, the defendant's counsel, without objection on the part of the plaintiff, cited cases decided in Kentucky, for the purpose of showing that promissory notes are not commercial paper in that State. *Schooling v. M'Ghee*, 1 T. B. Mon. 232. *Sharps v. Eccles*, 5 T. B. Mon. 69, 72. *Caldwell v. Cook*, 5 Litt. 181. *Prather v. Weissiger*, 10 Bush, 117, 126, 127. *Hyatt v. Bank of Kentucky*, 8 Bush, 193, 199. *Luckett v. Triplett*, 2 B. Mon. 39. *Clay v. McClanahan*, 5 B. Mon. 241. *True v. Triplett*, 4 Met. (Ky.) 57. *Thompson v. Moore*, 4 T. B. Mon. 79. The bill of exceptions does not find that these cases were not before the court at the trial. The Superior Court ruled, in substance, that the notes in suit are subject to any defence, discount, or offset that the defendants might have and might have used against the original obligees, Macomber and Greenwood, or any intermediate assignor, before notice of the assignment, in accordance with the provision of the Gen. Sta. of Kentucky, c. 22, § 6. An examination of the cases above cited shows that the ruling of the Superior Court was in accordance with the decisions of the courts of Kentucky upon this subject matter. But, independently of

these decisions, we cannot say that the ruling of the Superior Court was incorrect.

3. After the construction put upon the statute by the court, it remained to be determined whether there was any failure of consideration of the notes in suit. The sole consideration of the notes was the agreement to deliver certain goods. The payees, Macomber and Greenwood, failed, "and were unable to deliver the remainder of the goods to meet said notes." The court ruled that there was no consideration except for \$1128.07, which had been paid on the notes. This ruling was correct. The notes were not negotiable promissory notes, and failure of consideration could be set up as matter of defence thereto.

4. The evidence offered by the plaintiff, and excluded by the court, relative to the transactions between Macomber and Greenwood, and Wallace and Macomber, was properly rejected. It related to matters concerning which neither the plaintiff nor the defendant had any knowledge. They were clearly *res inter alios*.

5. The plaintiff finally contends that this Kentucky statute is in contravention of the Constitution of the United States. We see no reason why Kentucky may not enact a law making the liabilities of signers of commercial paper made and payable within its limits entirely different from the laws of other States respecting such liabilities, and by statute change absolutely the operation of the law merchant, so far as it affects contracts made and to be performed within that State. The Constitution of the United States presents no obstacle to the exercise of such power by the several States. The plaintiff has not referred us to any authorities or decisions in support of his contention that the statute of Kentucky is in conflict with the Constitution of the United States.

6. The construction of the Kentucky statute was for the court. *Kline v. Baker*, 99 Mass. 253, 255. On the rulings given, there was nothing in dispute which entitled the plaintiff to go to the jury.

*Exceptions overruled.*

RICHMOND IRON WORKS vs. HENRY B. WADHAMS.

Berkshire. Sept. 14. — Oct. 23, 1886. DEVENS, W. ALLEN, & C. ALLEN, JJ., absent.

In an action for breaking and entering the plaintiff's close, brought in 1883, it appeared that the plaintiff, in 1862, took possession of the land under a deed purporting to convey the same, and cut off all the wood and timber thereon; that the land was woodland when cut over by the plaintiff, and had been left to grow up to wood, and, at the commencement of the action, consisted of sprouts, about one acre of pasture, and some wet land, and all of it had been occupied by the defendant's cattle more or less since 1862; that it was entirely surrounded by the defendant's land; that the defendant had fenced his own land, and had thus included, within the fence, the plaintiff's land; that the defendant had used the lot as a pasture and place for his cattle to run, feed, and drink upon, without any hindrance or objection made by any one for more than twenty years; and that the defendant had also repaired a road through the plaintiff's land, and had used the road in going to and from his own land, and had from time to time, from 1856 to 1877, cut one or two cords of wood upon the plaintiff's land, and had allowed it to remain on the land for some time before taking the same away, so that it could be seen by any one. The defendant testified that he claimed this lot as his own since 1856 or 1857; and that he ever since had had full and exclusive possession and control of the same, unmolested by any one. *Held*, that the evidence did not tend to show a title to the land in the defendant by adverse possession, as against the plaintiff's prior title.

TORT for breaking and entering the plaintiff's close in Richmond, and cutting down and carrying away a quantity of wood and timber; and for converting the same to the defendant's use. Writ dated October 3, 1883. Trial in the Superior Court, before *Bacon, J.*, who ruled that the defendant had shown no defence to the action; directed the jury to return a verdict for the plaintiff; and reported the case for the determination of this court. If the ruling was correct, judgment was to be entered on the verdict; otherwise, a new trial to be had. The facts appear in the opinion.

*A. J. Waterman*, for the defendant.

*F. H. Wright*, (*J. Dewey* with him,) for the plaintiff.

FIELD, J. It seems to have been conceded at the trial, that the plaintiff had a sufficient title to, or possession of, the lot in question to enable it to maintain its action, unless the defendant had acquired title by adverse possession. It is found that the plaintiff acquired a good title by deed to eight acres and twenty-

eight rods, and if it did not, by the same deed, acquire title to the remaining five acres and seventy rods, it, in 1852, took possession of all the land under a deed purporting to convey the whole land, and exercised acts of ownership by cutting off all the wood and timber.

The defendant contends that there was evidence for the jury that he had acquired title by adverse possession after the plaintiff took possession under its deed. The land was woodland when cut over by the plaintiff, and had been left to grow up to wood, and, at the commencement of the action, "consisted of sprouts, about one acre of pasture, and some wet land, and all of it had been occupied by the defendant's cattle more or less ever since 1852." It was entirely surrounded by the defendant's land, and the defendant had fenced his own land, and had thus included, within the fence, the land of the plaintiff; but we do not understand that any fence had been built on any of the boundary lines between the plaintiff's land and the land of the defendant. The defendant had "used the lot as a pasture and place for his cattle to run, feed, and drink upon, without any hindrance or objection made by any one, for more than twenty years." By this we understand that the defendant's cattle, put upon his own land, went upon the plaintiff's land and used it, as well as the defendant's adjoining land, as a pasture. The defendant had also repaired a road through this lot of the plaintiff's, and had used the road in going to and from his own land, and had "from time to time, from 1856 to 1877," cut one or two cords of wood upon the plaintiff's land, and had allowed it to remain on the land "for some time before taking the same away, so that it could be seen by any one."

The defendant testified that he claimed this lot as his own since 1856 or 1857, and that he "ever since had had full and exclusive possession and control of the same, unmolested by any one;" but this must mean that his possession had been such as has been described. As the land upon which the defendant entered and cut the wood, and which he used in connection with his own land as a pasture, was wild, unenclosed land, we think the evidence did not tend to show a title in the defendant by adverse possession, as against the plaintiff's prior title, whether the plaintiff acquired it by deed, or by the possession which it took under the

deed before the defendant entered upon the land. *Coburn v. Hollis*, 3 Met. 125. *Williston v. Morse*, 10 Met. 17. *Slater v. Jepherson*, 6 Cush. 129. *Cook v. Babcock*, 11 Cush. 206. *Parker v. Parker*, 1 Allen, 245. *Morris v. Callanan*, 105 Mass. 129.

*Judgment on the verdict.*

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MARTHA V. STEVENS vs. FREDERICK MILES.

Berkshire. Sept. 14. — Oct. 23, 1886. DEVENS, W. ALLEN, & C. ALLEN, JJ., absent.

In an action for the use and occupation of certain premises described in a written lease, it appeared that the defendant had not signed the lease; and that the instrument was sent to him, and his son received it and placed it in the defendant's desk. The plaintiff called the son as a witness, who testified that he showed the lease to the defendant for his signature; that the defendant took it and read it, but did not sign it. The defendant asked the witness, on cross-examination, what the defendant said to him when he had read the instrument "about accepting, or signing, or executing, or refusing to accept, or sign, or execute, the same." *Held*, that the question was admissible as part of the *res gestæ*.

The plaintiff in an action testified that he received a letter, and sent it to a friend in another State, and that all that he knew about it afterwards was that his friend wrote that he had mislaid the letter and could not find it. The judge who presided at the trial then allowed the witness to testify to the contents of the letter. *Held*, that the defendant had no ground of exception.

GARDNER, J. 1. The plaintiff seeks to recover for the use and occupation of certain premises described in a written lease signed by the plaintiff but not by the defendant. The instrument was sent to the defendant, and his son received it and placed it in his father's desk. The plaintiff called the son as a witness. He testified that he showed the written lease to his father, Frederick Miles, for his signature; that he took it and read it, but did not sign it. The defendant, upon cross-examination, asked the witness what his father said to him, when he had read the instrument, "about accepting, or signing, or executing, or refusing to accept, or sign, or execute, the same." This question was excluded.



Without determining what privilege the right to cross-examine the witness gave the defendant, we think, upon principle, that the question should have been allowed to be put. It is well settled, as a general rule, that the declarations of a party to a suit are not admissible in his own favor. The qualification to this rule is laid down in *Wright v. Boston*, 126 Mass. 161, "that, where an act of the party is admissible in evidence, any declaration accompanying and giving character to the act is competent." This is put upon the ground, that the declaration is a part of the act, a part of the *res gestæ*. But such declarations are only admissible when the acts of which they are a part are competent.

In the case at bar, it became material, upon the question of damages, to determine whether the defendant accepted the lease. The evidence offered by the plaintiff as to what the defendant did with the instrument, that he read it, was competent. Under the rule laid down in *Wright v. Boston*, *ubi supra*, any declaration made by the defendant, accompanying the act of taking and reading the lease, was also competent. It was a part of the act of taking and reading it, a part of the *res gestæ*. This act of taking and reading the instrument by the defendant was deemed important by the plaintiff, and was relied on by her in support of her case. What the defendant said may have given character to the act, and given it a different meaning from that claimed by the plaintiff. We think that the evidence should have been admitted.

2. The second objection relates to the admission of secondary evidence of the contents of a letter from William A. Miles to the plaintiff. She testified, without objection, that she received the letter, but did not then have it; that she sent it to a friend in New York, by mail; and that all that she knew about the letter after that was, that she received a letter from the said friend stating that he had mislaid it and had not been able to find it. The friend's letter was not produced, and no other evidence was introduced to account for the non-production of the letter from William A. Miles. The witness was then allowed, against the objection of the defendant, to testify to the contents of the letter from Miles.

There was no exception to the preliminary evidence introduced. The finding of the presiding judge upon preliminary

questions of fact material to the competency of evidence at the trial are not open to revision in this court. *Walker v. Curtis*, 116 Mass. 98. The evidence tended to show that the original letter was not in the possession or under the control of the witness, and that it was without the jurisdiction of the court. We find no error in the introduction of secondary evidence of the contents of the letter. *Exceptions sustained.*

*A. J. Waterman & E. T. Slocum*, for the defendant.

*J. Dewey & F. H. Wright*, for the plaintiff.



COMMONWEALTH vs. HENRY C. JONES.

Berkshire. Sept. 14. — Oct. 23, 1886. DEVENS, W. ALLEN, & C. ALLEN, JJ., absent.

If a license is granted for the sale of intoxicating liquors in a certain room of a building, the location of the whole building is to be considered in determining whether it is within the "four hundred feet" of a public school-house on the same street, under the St. of 1882, c. 220, § 1.

The "four hundred feet" from a building occupied by a public school, named in the St. of 1882, c. 220, § 1, as the distance within which no license of the classes specified shall be granted for the sale of intoxicating liquors in any building on the same street, are to be determined by measuring the nearest point of each building to the other, whether they are close to the line of the street, or some distance from it.

COMPLAINT, under the Pub. Sts. c. 101, § 7, for keeping and maintaining a common nuisance, to wit, a certain tenement in West Stockbridge, used for the illegal sale and illegal keeping of intoxicating liquors, on May 1, 1884, and on divers other days and times between that day and July 5, 1884. At the trial in the Superior Court, before *Knowlton, J.*, the following facts appeared :

The defendant at the time named in the complaint was licensed as an innholder, but not as a common victualler, and kept a hotel on Main Street in West Stockbridge, called the West Stockbridge House. On the same street was a school-house in which a public school was kept. The defendant occupied for the

business of said hotel parts of two buildings, one of which was wholly within the distance of four hundred feet from said school-house, and the other was adjacent to the first, and its nearest portion was distant from said school-house about three hundred and seventy feet. In this latter building, which was known as the Campbell Hotel, the defendant had a room where he kept and was accustomed to sell intoxicating liquors, under a license of the first class, in the usual form. This was the northeast room upon the first floor. No part of this room was within four hundred feet of said school-house. This building was the property of the defendant's wife, and portions of it were rented by her to tenants. Other portions which were within four hundred feet of said school-house were not used, because the defendant had no occasion to use them; but, with his wife's permission, they were in his possession for use in his hotel business when occasion might require, and in the same way as were those portions of the same building which were more than four hundred feet from said school-house.

The distance from the Campbell Hotel to the school-house, if measured in a line to the street, and thence along the street to a point opposite the school-house, and thence from the street to said school-house, was more than four hundred feet. The language of the license descriptive of the premises was as follows: "At the West Stockbridge House, northeast room, first floor, known as the Campbell Hotel, in said West Stockbridge."

Upon these facts the judge ruled that the license was void under the St. of 1882, c. 220; and, the jury having returned a verdict of guilty, the case was reported, with the consent of the defendant, to this court, for its decision of the question of law involved. If said ruling was wrong, the verdict was to be set aside and a new trial granted; otherwise, judgment to be entered on the verdict.

*H. J. Dunham*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

GARDNER, J. This case presents the question as to the construction of the St. of 1882, c. 220, § 1, which is as follows: "No license . . . shall be granted for the sale of intoxicating liquors in any building or place on the same street within four hundred feet of any building occupied in whole or in part by a public

school." The defendant's license authorized him to sell "at the West Stockbridge House, northeast room, first floor, known as the Campbell Hotel, in said West Stockbridge." No part of this northeast room was within four hundred feet of the school-house. But portions of the Campbell Hotel, in which was the licensed room, were within four hundred feet of the school-house.

The language of the statute is plain. It does not use the word "room," or "tenement," but "building." Its apparent object was to prevent the sale of liquor in any building on the same street with a public school-house, and within four hundred feet of it. If the defendant sold intoxicating liquors in the northeast room of the Campbell Hotel, and the Campbell Hotel was within four hundred feet of a public school-house and on the same street with it, then his license to sell intoxicating liquors in such northeast room would be no defence.

The defendant contends that the language of the statute, "building or place," should be construed to mean that, if a license limits the sale to a particular room in a building, that room is a "place," and its location is to be considered without regard to the rest of the building. We do not understand that the statute is limited to so narrow a construction. The word "place" is intended to cover the case where there is no building, but where a tent, booth, excavation in the ground, or something similar, is used for the purpose of selling liquor.

The school-house and the building containing the licensed room were on Main Street, and each had entrances from the same street. The distance from the Campbell Hotel to the school-house, if measured in a line to the street, thence along the street to a point opposite the school-house, and thence to the school-house, is more than four hundred feet. The defendant contends that this measurement should be used to determine the distance of the two buildings, under the statute. If the two buildings are situated upon the same street, that is, if they have entrances from a common street, the four hundred feet are to be determined by the distance between the two buildings, without any other measurement. The distances of the buildings from the street form no part of the distance of the buildings from each other. It is not necessary that the buildings should be situated

on the line of the same street. They may perhaps be some distance from the line of the street, with a walk leading to them, but they are situated as completely on the same street as they would be if the buildings abutted upon the line of the street. Whenever the school-house and the building in which a license is granted are situated upon the same street, whether close to the street or some distance from it, the four hundred feet between them are to be determined by measuring the nearest point of each house to the other. This will determine the distance required by the statute.

The rulings of the Superior Court were in accordance with the views we have expressed, and the entry, according to the terms of the report, must be, *Judgment on the verdict.*

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MERRICK C. LANGDON vs. MARY E. STEWART.

Berkshire. Sept. 15. — Oct. 23, 1886. DEVENS, W. ALLEN, & C. ALLEN, JJ., absent.

A deed of a collector of taxes recited that "no person has appeared to discharge said tax," and that the collector "has demanded the same of S., the reported owner of said real estate;" but the deed did not state that fourteen days elapsed after the demand before advertising the premises for sale, or that the tax was not paid within fourteen days after the demand. *Held*, that, under the Gen. Sta. c. 12, §§ 22, 35, the deed was void.

WRIT OF ENTRY to recover a parcel of land in Sandisfield. Plea, nul disseisin. At the trial in the Superior Court, before Bacon, J., without a jury, the tenant claimed title to the demanded premises under a deed from the collector of taxes of Sandisfield, dated May 24, 1875. The demandant contended that the deed was insufficient to convey to the tenant a valid title to the premises. The judge so ruled, and found for the demandant; and the tenant alleged exceptions. The facts material to the point decided appear in the opinion.

A. J. Waterman, for the tenant.

J. Dewey, for the demandant.

FIELD, J. The only material exception is to the ruling that the tax deed conveyed no title to the tenant. The Gen. Sts. c. 12, § 35, required that the deed "shall state the cause of sale;" and § 22 provided that taxes on real estate may be levied "by sale thereof, if the tax is not paid within fourteen days after a demand of payment." This deed recites that "no person has appeared to discharge said tax;" and that the collector "has demanded the same of John J. Stewart, the reported owner of said real estate;" but there is no statement that fourteen days elapsed after the demand before advertising the premises for sale, or that the tax was not paid within fourteen days after the demand. A demand made on the day of the sale would satisfy the recitals in the deed. The deed is therefore void. *Harrington v. Worcester*, 6 Allen, 576. *Reed v. Crapo*, 127 Mass. 39. *Adams v. Mills*, 126 Mass. 278. *Exceptions overruled.*

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COMMONWEALTH vs. CLARENCE C. LYNES.

Hampshire. Sept. 21. — Oct. 23, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

In a criminal case, when the witnesses for the government were about to be sworn, the defendant objected to the oath being administered to one of them, a girl thirteen years old, on the ground that she was ignorant of the nature and obligation of an oath. The girl said that she understood that the oath was to tell the truth, and that she would be punished if she did not tell the truth after taking it, but that she did not know how or by whom she would be punished. The judge said he would postpone the decision of her competency, and she could be instructed, if necessary. The next day she was offered as a witness, and was found competent and permitted to testify, against the exception of the defendant. It appeared that, after the adjournment of the court the first day, she was instructed by a Christian minister, who told her that God would punish her, if, after taking the oath, she testified what was not true; and that she did not know this before. *Held*, that a bill of exceptions, taken by the defendant, and setting forth these facts, showed no ground of exception.

In a criminal case, the testimony of a witness was admitted, without objection, as corroborating the testimony of an accomplice of the defendant. The defendant requested the judge presiding at the trial to instruct the jury that the testimony of the accomplice should be corroborated in some material fact. The judge gave this instruction. The defendant further asked the judge to rule that the

evidence of the other witness afforded no such corroboration, but, on the contrary, was contradictory and conflicting, and, if the jury found it to be so, it was their duty to acquit. The judge refused so to rule. *Held*, that the defendant had no ground of exception.

At the trial of an indictment for incest, the judge instructed the jury that carnal knowledge and penetration were necessary to be proved to convict the defendant. *Held*, that the defendant was not entitled to have the jury further instructed, that, if they could not find, on the testimony of the girl with whom the offence was alleged to have been committed, that the defendant had actual sexual intercourse with her, by penetration, they should acquit.

At the trial of a man for incest, it appeared that the girl with whom the offence was alleged to have been committed was thirteen years old. Medical experts, who examined the girl six weeks after the time of the alleged offence, were permitted to testify to the abnormal condition of the girl's private parts at the time they examined her, and to the causes which would produce such condition. *Held*, that the defendant showed no ground of exception.

INDICTMENT for incest. At the trial in the Superior Court, before *Knoulton*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

*C. G. Delano*, for the defendant.

*E. J. Sherman*, Attorney-General, for the Commonwealth.

GARDNER, J. 1. The defendant's daughter, with whom the offence was alleged in the indictment to have been committed, was thirteen years old at the time of the trial of the case; and, when the government called its witnesses to be sworn, the defendant objected to the administration of the oath to her, on the ground that she was ignorant of the nature and obligation of an oath. The presiding judge asked her some questions, to which she replied that she understood that the oath was to tell the truth, and that she would be punished if she did not tell the truth after taking it, but that she did not know how or by whom she would be punished. The judge then asked the district attorney if he desired to call her at that time, to which he replied, "No." The judge then said he would postpone the decision of her competency, and she could be instructed, if necessary. The next day she was offered again as a witness, and, upon examination, was found competent, and was permitted to testify, against the objection and exception of the defendant, on the ground that it appeared, as it did in her examination, that she had been instructed by a Christian minister since the last adjournment of the court. On cross-examination, she testified that the minister told her that God would punish her, if, after

taking the oath, she testified what was not true, and that she did not know that before.

The defendant contended, at the argument, that the knowledge of the nature and obligation of an oath must exist independently of the exigencies of the trial, and that it cannot be supplied for that purpose by special instruction. The practice has not been uniform upon this question. In *Rex v. Williams*, 7 C. & P. 320, the defendant was indicted for the murder of her husband, and her daughter, eight years old, was called as a witness. It appeared that before the death of her father, which took place about sixteen weeks before the trial, the child had never heard of God, or of a future state of rewards and punishments; and that she never prayed, nor knew the nature of an oath; but that since the death of her father she had been visited twice by a clergyman, who had given her some instruction as to the nature and obligation of an oath. She said she should go to hell if she told a lie, and that hell was under the kitchen grate; but she had still no intelligence as to religion or a future state. Mr. Justice Patteson refused to allow the girl to testify, and stated his reasons therefor, as follows: "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that, previous to the happening of the circumstances to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." In the course of the trial, the counsel for the King stated that it was every day's practice to put off a trial in order that a witness might be instructed as to the nature of an oath, citing *Rex v. Wade*, Ry. & M. 86. The oath, however, was refused the witness. The reasons first given by the learned justice have been criticised, and have not generally been followed.

In *Regina v. Nicholas*, 2 C. & K. 246, Pollock, C. B., refused to put off the trial in order that a child of six years of age might receive instruction, but said: "There may be cases where



the intellect of the child is much more ripened, as in the cases of children of nine, ten, or twelve years old; for example, where their education has been so utterly neglected that they are wholly ignorant on religious subjects. In those cases a postponement of the trial may be very proper; but where the infirmity arises from no neglect, but from the child being too young to be taught, I doubt whether the loss in point of memory would not more than countervail the gain in point of religious education. I lay down no general rule, as there may be cases where a postponement would be proper."

In the English practice, it is usual for the judge to examine an infant as to his competency before going before the grand jury, or before proceeding to trial, and, if found incompetent for want of proper instruction, in his discretion, to put off the trial in order that the infant may, in the mean time, receive such instruction as may qualify him to take an oath. *Roscoe Crim. Ev.* (7th Am. ed.) 114. 3 *Russ. on Crimes* (9th Am. ed.) 612. 1 *Stark. Ev.* (4th ed.) 117. *Rex v. White*, 1 Leach, 430. *Regina v. Milton*, Ir. Cir. Rep. 16. *Regina v. Baylis*, 4 Cox C. C. 23. The same practice is laid down in 1 *Greenl. Ev.* (14th ed.) § 367. It is left discretionary with the court, when a principal witness offered is not yet sufficiently instructed in the nature of an oath, to put off the trial that this may be done.

The defendant in his bill of exceptions has given us no information as to the moral condition of the witness, before she was called to testify; nor whether she had been instructed in religious knowledge to any extent. We are not informed what her intellect was, nor how far it was ripened. All these considerations were before the judge, who examined the witness before and after her instruction. If it had appeared to the presiding judge that the witness did not sufficiently understand the nature and obligation of an oath, we think that it was within his discretion to permit the child to be properly instructed, provided she was of sufficient age and intellect to receive instruction.

But the real question arose at the time when she was called upon to take the oath. The judge must then have been satisfied that the witness at that time understood the nature of an oath, and the solemn responsibility which then rested upon her to speak the truth. He was to say whether she understood the

sanctity of an oath, so that she could be a witness, and the jury were to determine whether they believed her evidence. *Regina v. Hill*, 5 Cox C. C. 259. *Kendall v. May*, 10 Allen, 59, 64. The question of competency, depending upon the fact in evidence, was to be decided by the court. When, therefore, the judge had examined the witness and found her competent to be sworn, and she was permitted to testify, we think that the defendant could not object upon the ground that she had been instructed by a Christian minister since the last adjournment of the court.

2. The defendant requested the judge to instruct the jury, that the daughter, being *particeps criminis*, or partaker in the act, any statement made by her tending to prove the guilt of the defendant should be corroborated in some material fact; that the evidence of Minnie Lynes (a niece of the defendant and a witness for the government) afforded no such corroboration, but on the contrary was contradictory and conflicting; and if the jury found it to be so, it was their duty to acquit the defendant. The judge instructed the jury as requested, down to and including the word "fact"; and declined to give the remainder of the ruling asked for. That which was refused called upon the presiding judge to express his opinion as to the testimony of the witness, and to characterize it to the jury as "contradictory and conflicting." This would be instructing the jury with respect to matters of fact, which is prohibited by the Pub. Sts. c. 153, § 5. The testimony of the witness Minnie Lynes had been admitted without exception, and was before the jury. The prayer for instruction, in the entire form in which it was presented, the court was not required to give.

3. The defendant also asked the judge to instruct the jury, that, if they could not find, on the testimony of the daughter, that the defendant had actual sexual intercourse with her, by penetration, on the occasion on which the government had elected to rely, they should acquit the defendant.

This request was properly refused. The court had already, at the defendant's request, fully instructed the jury that carnal knowledge and penetration were necessary to be proved to convict the defendant; and that an unsuccessful attempt to accomplish this end did not constitute the offence charged. The jury were not confined to the testimony of the daughter upon this

question, but had the right to consider all the evidence in the case.

4. No question was made as to the competency of the medical experts. The subject matter of their testimony related to the normal and abnormal condition of the private parts of the child with whom the offence was alleged to have been committed, and to the causes which would produce such abnormal condition. This testimony from experts accustomed to observe such conditions would aid the jury. *Commonwealth v. Piper*, 120 Mass. 185. It must be taken for granted that it appeared that the status of the child when examined by the physicians, on June 23, 1886, was substantially the same as it was soon after May 12, 1886, when the offence was alleged to have been committed. The bill of exceptions does not report all the testimony.

*Exceptions overruled.*

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G. M. LINDSEY *vs.* MARIA H. PARKER & others.

Hampshire. Sept. 22. — Oct. 23, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

Judgment by agreement was entered against an attaching officer in an action brought against him for the conversion of the attached property. He then brought an action upon a bond of indemnity given to him by the plaintiff in the writ on which the attachment was made. It was not contended that the judgment by agreement was collusive or fraudulent, either as affecting the parties to it, or others collaterally affected by it; and it was not contended that the officer could have successfully defended the action in which the judgment was entered. *Held*, that this was, in effect, an admission that there was no defence to that action; and that such an admission rendered immaterial the question whether there was sufficient evidence to show that a person who claimed to be acting as the attorney of the principal on the bond, who directed the officer to make the attachment, and who also instructed him to pay the execution issued on the judgment, had any authority to act for such principal.

The condition of a bond given to an attaching officer, to indemnify and save him harmless "of and from all suits, damages, and costs whatsoever, whereunto he may be liable, or obliged by law to pay to any person or persons, by reason of the said attachment," includes counsel fees reasonably incurred in the defence of an action occasioned by the attachment.

CONTRACT, against Maria H. Parker, William Tinker, Norman Strickland, and E. L. Day, upon a bond executed by the

first-named defendant as principal, and by the other defendants as sureties; and conditioned to indemnify and save harmless the plaintiff, who, as a deputy sheriff, had attached certain personal property on a writ in favor of the defendant Parker against one Willis, "of and from all suits, damages, and costs whatsoever, whereunto he . . . may be liable, or obliged by law to pay to any person or persons, by reason of the said attachment."

Trial in the Superior Court, without a jury, before *Staples, J.*, who reported the case for the determination of this court, in substance as follows:

It was agreed that the plaintiff was sued in an action of tort by one Cannon, in the Superior Court for said county, for the alleged conversion of the property attached on the writ of Parker against Willis, referred to in the bond declared on; that judgment against the present plaintiff was recovered in said suit, by agreement, on June 25, 1884, for \$75, damages, and \$42.42, costs of suit; that execution issued on said judgment on August 14, 1884; that on said execution the plaintiff paid the sum of \$115.67; and that the plaintiff, in defending said suit, incurred and paid, as a reasonable expense for counsel fees therein, the sum of \$56. It was not contended that said judgment by agreement was collusive or fraudulent, either as affecting the parties to it or others collaterally affected by it, and it was not contended that Lindsey could have successfully defended said suit.

The plaintiff testified as follows: "I received this bond by mail from Norman Strickland. Mr. Kress made the bond out, and no names were then inserted in it. Norman Strickland gave me the writ in Parker against Willis, on which I made the attachment. I had a talk with Maria H. Parker in June or July, 1884. She said Strickland told her he should see that the matter was fixed up so that I should not suffer. She said he had been collecting bills for her, this bill among the rest, and she expected to pay the amount."

The plaintiff here put in evidence the following writing, signed, "Norman Strickland, attorney for Maria H. Parker": "G. Kress, Esq.: I hereby authorize you to settle case Cannon v. Lindsey, pending in Superior Court, Hampshire, as well as he can in the interest of the defendant."

The plaintiff further testified: "This writing was mailed to me by Strickland. Mr. Kress was my attorney in the suit of Cannon against Lindsey. I received it prior to the entry of judgment therein. I never saw Strickland till the day he gave me the writ on which I attached. I never spoke with any of the other defendants as to a settlement of the suit against me."

The plaintiff further testified, against the objection of the defendants: "I had a conversation with Strickland before I paid. He told me to pay the execution. I did so under his direction."

The plaintiff put in evidence the written direction to attach on the writ of Parker against Willis, signed by Norman Strickland as the plaintiff's attorney. This evidence was admitted, against the objection of the defendants, only as tending to show that Strickland acted as attorney for Mrs. Parker in bringing that suit. It was admitted that Strickland was not a member of the bar; and no special authority from Mrs. Parker to him to conduct the suit was shown.

The defendants asked the judge to rule that, on all the evidence, the plaintiff could not recover against the defendants or any of them; and that the evidence did not show any relation of Strickland to this case. The judge refused so to rule; found and ordered judgment for the plaintiff against all the defendants in the penal sum of the bond; awarded execution, for a breach of said bond, in the sum of \$188.66, being the sum paid on said execution, together with said sum of \$56, paid as counsel fees in defending the suit of Cannon against Lindsey, and interest on the combined sums from the date of the writ.

If the evidence objected to by the defendants was material, and should have been excluded, or if either of the rulings asked for should have been given, the finding and judgment were to be set aside, and a new trial granted; otherwise, to stand. If the sum awarded on the execution was right, the same was to stand; if wrong, the sum so awarded was to be altered, modified, or set aside, as the court should think proper.

*J. C. Hammond*, for the defendants.

*G. Kress*, for the plaintiff.

FIELD, J. The only exceptions argued are, first, that it does not appear by any competent evidence that Norman Strickland was authorized by Mrs. Parker to agree to a settlement of the

suit of Cannon against Lindsey; and, secondly, that the sum paid by Lindsey as counsel fees in said suit cannot be included in the amount for which execution is to issue.

It appears by the report, that it was not contended that the judgment entered in the suit by agreement "was collusive or fraudulent, either as affecting the parties to it or others collaterally affected by it, and it was not contended that Lindsey could have successfully defended said suit." This, we think, is, in effect, an admission that there was no defence to the suit; and such an admission rendered the evidence objected to immaterial. There is no suggestion in the report that the settlement was not reasonable and proper.

The bond is in the common form, to indemnify and save harmless the plaintiff "of and from all suits, damages, and costs whatsoever, whereunto he . . . may be liable, or obliged by law to pay to any person or persons, by reason of the said attachment." The objection to including counsel fees in the sum for which execution is to issue is put solely upon the ground that they are not included in the damages and costs from which the defendants are to save the plaintiff harmless. The principles on which reasonable counsel fees are excluded from or included in the damages to be recovered, when there is no express contract of indemnity, were considered in *Westfield v. Mayo*, 122 Mass. 100; and the effect of an agreement of indemnity, general in its terms, was considered in *Howard v. Lovegrove*, L. R. 6 Ex. 43. See also *Smith v. Compton*, 3 B. & Ad. 189. It has been said that "the law measures the expenses incurred in the management of a suit by the taxable costs." *Reggio v. Braggiotti*, 7 Cush. 166, 170. See also *Henry v. Davis*, 123 Mass. 345, 346. But that these expenses exceed the taxable costs is now notoriously true. It was Lindsey's duty to ascertain and determine whether there was a defence to the suit, and to defend it if there was a defence, and to employ counsel for that purpose, unless Mrs. Parker took upon herself the defence of the suit; and, as the words of the bond are all "costs whatsoever" to which the plaintiff "may be liable," as well as the costs which he may be "obliged by law to pay to any person or persons," we think that they may be construed to include counsel fees reasonably incurred in the defence of a suit occasioned by the attachment.

The judgment is affirmed, and execution is to issue for the sum awarded by the Superior Court, with interest from the date of the award. See *New Haven & Northampton Co. v. Hayden*, 117 Mass. 433.  
*So ordered.*

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CLARA A. KITES *vs.* MYRON L. CHURCH.

Hampden. Sept. 28. — Oct. 23, 1886. DEVENS & W. ALLEN, JJ.,  
absent.

A tenant in common of real estate may recover of his cotenant, under a count on an account annexed, one half of the amount paid for taxes assessed upon the estate.

If a tenant in common of real estate occupies the whole estate under an oral agreement to pay his cotenant for the occupation, the latter may recover for the same under a count on an account annexed, although his claim is described therein as for "rent."

CONTRACT, upon an account annexed, in two items, the first item being, "To three years' rent of undivided half of store from March 21, 1880, to March 21, 1883, at \$150 per year, \$450;" and the second item being, "To cash paid for taxes for 1882 on the defendant's undivided half of store property, \$22.10." Trial in the Superior Court, before *Bacon, J.*, who allowed a bill of exceptions, in substance as follows:

It appeared in evidence, and was admitted, that the plaintiff and the defendant were tenants in common of certain real estate in Huntington, on which was a store occupied by the defendant. The plaintiff and the defendant are brother and sister, and inherited said estate from their father, one Lyman Church.

The defendant occupied the store for some three years after the death of his father, and the plaintiff received none of the income of the store during the time the defendant occupied the same. There was a hall over the store occupied by a masonic lodge, the income from which was received in equal moieties by both the plaintiff and the defendant.

The plaintiff, by herself and one other witness, introduced evidence tending to show that she had demanded of the defendant,

at different times, rent for her half of the store; and that the defendant had promised to pay her rent "some time," but no definite sum was ever demanded or agreed upon. This talk was during the defendant's occupancy, who occupied the entire store as a grocery.

The defendant denied that he had ever agreed to pay rent for the plaintiff's half of the store; but testified that, at the time of the first conversation with the plaintiff, when she asked him, "Are you going to pay me rent?" he said to her that she could occupy her half of the store any time she desired. One Cole testified that he was present and heard said conversation. This was all denied by the plaintiff.

There was evidence tending to show that there were other conversations, at different times, between the parties, concerning the payment of rent by the defendant to the plaintiff, substantially like the one first above mentioned, and tending to show that there was an agreement whereby the defendant was to pay the plaintiff for his use and occupation of the store.

There was no lease or written agreement between the plaintiff and the defendant relating to the defendant's occupancy of said store. There was evidence of the value of the use of the plaintiff's interest in said property as occupied by the defendant.

There was also evidence tending to show that, for the year 1882, taxes on said property were assessed properly to the heirs of Lyman Church, deceased, without designating any of them by name; that the plaintiff and the defendant were the only heirs of Lyman Church; and that, in February, 1883, the plaintiff paid the entire tax for the year 1882, assessed on said property, which amounted to \$44.20

The defendant asked the judge to rule "that, if the plaintiff said to the defendant, as she testified, 'Are you going to pay me rent?' that was not a claim to be admitted into possession; that there was no evidence that the defendant made any hindrance to the occupation of the plaintiff; and that there could be no recovery in this action of the second item of the account annexed."

After the evidence and the defendant's argument were closed, the defendant asked the judge to rule that the plaintiff could not recover in this action at all, because this was an action on an



account annexed to recover rent, by a tenant in common against her cotenant. The judge declined so to rule, and ruled that the objection should have been made earlier by a plea in abatement. The judge also ruled that the word "rent" was strictly applicable only where there was a written lease, but that the plaintiff might recover under the declaration, if she had proved that the defendant orally agreed to pay the plaintiff for the use and occupation, though the parties spoke of it, and it was described in the declaration, as rent, if the parties understood it in its popular sense as the proper word to use, even when there was no lease in writing; that the law would not imply an agreement from the fact of the defendant's occupancy; that the plaintiff could recover nothing for the time the defendant occupied before such agreement was proved to have been made, but only for such time as the agreement covered after it was made; that the jury must find there was a clear agreement in order to entitle the plaintiff to recover; and that, if the rate of compensation was not agreed upon by the parties, the jury might determine what it ought to be from the evidence in the case.

The jury returned a verdict for the plaintiff for \$257.06; and the defendant alleged exceptions.

*E. H. Lathrop*, for the defendant.

*W. G. Bassett & G. Kress*, for the plaintiff.

FIELD, J. The plaintiff may recover of the defendant one half of the amount of the tax paid. The Pub. Sts. c. 11, § 18, give the right of action, and, independently of the statute, it is probable that an action would lie, because the tax was a lien upon the land which both tenants were equally bound to discharge. *Dickinson v. Williams*, 11 Cush. 258. The law regards one half of the money paid to discharge this lien as money paid at the request of the defendant and for his use, and it can be recovered in an action upon an account annexed. *Nichols v. Bucknam*, 117 Mass. 488. *Bowen v. South Building*, 137 Mass. 274.

It is uncertain from the exceptions whether the court gave or did not give the first and second instructions requested. They plainly became immaterial from the instructions subsequently given. The defendant was in the sole occupation of the store. The court ruled, in effect, that if the defendant orally agreed to pay the plaintiff for the use and occupation of the store, the

plaintiff could recover, under the declaration, what the occupation was reasonably worth, from the time when the agreement was made, so long as the defendant occupied under this agreement; but that no such agreement was to be implied from the fact of the defendant's occupancy.

The defendant, at the close of his argument, requested the court to rule "that the plaintiff could not recover in this action at all, because this was an action on an account annexed to recover rent, by a tenant in common against her cotenant." By statute, as well as by usage in this Commonwealth, the word "rent" may include the compensation to be paid for the occupation of land by a tenant, whether he holds under a written lease, or at will, or at sufferance, and whether the amount to be paid has been defined by the agreement of the parties, or has been left indefinite. *Rice v. Loomis*, 139 Mass. 302.

If the parties have not agreed upon the amount, the law implies that the tenant has agreed to pay to his landlord what the occupation is reasonably worth. If an oral agreement between two tenants in common, that one, in consideration that he be permitted to have the sole occupation of the land, shall pay to the other whatever the occupation of the other's share shall reasonably be worth, does not in all respects constitute the ordinary relation of landlord and tenant, still the first item in the account annexed intelligibly described the claim of the plaintiff; and, if the word "rent" was not technically appropriate, it is plain that the defendant was not misled by it, and it might well be held, after the trial had proceeded without objection to the final arguments, that the cause of action was described with sufficient certainty. If the defendant had the sole occupation of the store under an express promise to the plaintiff to pay her for the occupation, the plaintiff could maintain an action for use and occupation under this agreement, and therefore could maintain an action on an account annexed; and the ruling of the court was sufficiently favorable to the defendant. *Wilbur v. Wilbur*, 13 Met. 404. *McKay v. Mumford*, 10 Wend. 351.

*Exceptions overruled.*

## JULIAN HOLMES vs. TURNER'S FALLS COMPANY &amp; another.

Franklin. Sept. 29. — Oct. 23, 1886. DEVENS & W. ALLEN, JJ., absent.

A conveyance of land made by a mortgagee, which declares that it is made by virtue and in execution of the power contained in the mortgage, and of every other power him thereto enabling, operates as an assignment of the mortgage, even if the fee is not conveyed by reason of a defect in the execution of the power of sale; and, after an entry has been made for breach of the condition of the mortgage, the assignee may maintain a writ of entry against a person in possession who shows no title to the land.

If a deed describes the boundary line of a parcel of land as beginning at a certain point, and thence running across a road, and thence by the side of the road, title to the centre of the road does not pass, unless a contrary intent appears.

If a ruling requested is properly refused, and the judge gives a ruling on the same subject matter which is erroneous, and the party requesting the ruling excepts both to the refusal to rule as requested and to the ruling given, he is not precluded from availing himself of the latter exception.

If an owner of land, after conveying it in mortgage, leases it, and the mortgagee, after an entry for breach of condition of the mortgage, brings a writ of entry against the lessee to recover possession of the land, to which the lessee files a plea of *nul disseisin*, the lessee is not estopped by the lease to contest the demandant's title, if he has not attorned to him, or been compelled to pay rent to him.

WRIT OF ENTRY, dated March 8, 1888, against the Turner's Falls Company and the Turner's Falls Lumber Company, to recover a strip of land at Turner's Falls. Plea, *nul disseisin*, with certain specifications of defence, which need not now be stated.

At the trial in the Superior Court, before *Thompson, J.*, the jury returned a verdict for the demandant for a portion of the premises described in the writ; and the tenants alleged exceptions, which appear in the opinion.

*G. M. Stearns & A. De Wolf*, for the tenants.

*F. G. Fessenden*, for the demandant.

FIELD, J. It is difficult to deal with the exceptions in this case, because they are in parts obscure, and it is impossible to apply all the deeds put in evidence to the land.

The "demandant had no other title excepting such as he acquired by the sale under the mortgage." The tenants asked the court to rule that this sale "was invalid and the deed under it invalid." The court ruled that "the sale was a good sale and the deed valid." This mortgage was given by Nathaniel Holmes

and David A. Wood to Timothy M. Stoughton, on April 10, 1869. Stoughton released two tracts of land from the mortgage, and afterwards, on May 22, 1877, assigned the mortgage, with others, to Peleg Adams. The tracts released apparently did not include any part of the land demanded. The assignment of the mortgage was made as "collateral security." On February 28, 1882, Adams duly made entry upon the land for breach of the conditions of the mortgage, and duly made and recorded a certificate of such entry; and having, pursuant to the power of sale contained in the mortgage, advertised the premises for sale, excepting the two tracts which had been released, he on said February 28, 1882, after he had made entry, sold the premises advertised in parcels, selling the last parcel to the demandant, and giving him a deed, in which he described himself as acting "by virtue and in execution of the power contained in said mortgage deed as aforesaid, and of every other power me hereto enabling."

The tenants contend that this sale was invalid, because, as they say, Adams held the note and mortgage "as collateral security," and Stoughton still had an interest in it, and Adams alone could not execute the power; and because the sale, and the deed given in pursuance of the sale, included the whole of an old road, while the mortgage only conveyed the land to the central line of the road.

It is immaterial, we think, whether this sale was good or not. If it was not a good sale, the deed of Adams to the demandant operated as an assignment to the demandant of the mortgage, under which an entry upon the land had been made, and such a mortgage title would support the action against these tenants, who show no title. *Haven v. Adams*, 4 Allen, 80, 93. *Brown v. Smith*, 116 Mass. 108.

The tenants also contend that the location of a road laid out in 1764 was such that, if the demandant was restricted to the easterly side of said road, and did not acquire title to any part of said road westerly of the easterly and northerly side, none of the premises occupied by the tenants and described in the demandant's writ would be included or touched; and they asked the court to rule that "no part of the road, along the line described as aforesaid, passed by the Smalley deed, and that the

premises, conveyed by said deed on said line, extended only to the easterly and northerly side of the road." The court ruled that "the deed conveyed to the centre of the road, and passed, by the intermediate conveyances, title to the said centre to the demandant, provided Smalley owned to the centre of the road."

This Smalley deed is a deed of quitclaim of William Smalley to Reuben Shattuck, dated February 24, 1795, and the premises are described as "beginning on Connecticut River at the head of the falls, at the southwest corner of the lot No. 47 recorded to Stephen Williams, thence running east forty-five degrees north across the road leading to Pendell's Ferry, thence by said road on the easterly and northerly side thereof to Fall River by the bridge, thence," etc. If this deed conveyed the land to the centre line of the road, it may be conceded that the subsequent deeds conveyed to this centre line.

We think that the ruling of the court upon the construction of this deed was wrong. When a line runs across a road, and then runs "by the said road on the easterly and northerly side thereof," the boundary is the easterly and northerly side of the road unless a contrary intent appears on the face of the deed, and we can find nothing in the deed which shows any intention to convey to the centre line of the road. The words are express, that the boundary is not on the road, but on the easterly and northerly side of it. *Sibley v. Holden*, 10 Pick. 249. *Phillips v. Bowers*, 7 Gray, 21, 25. *Smith v. Slocomb*, 9 Gray, 86. *Brainard v. Boston & New York Central Railroad*, 12 Gray, 407, 410. *Boston v. Richardson*, 13 Allen, 146. *Peck v. Denniston*, 121 Mass. 17.

The demandant contends that this request asked the court to rule, as matter of law, that the road laid out in 1764 was the road mentioned in the Smalley deed, and that this was a fact in controversy; but the exception is to the ruling, as well as to the refusal to rule, and the ruling is erroneous, whether it be held to imply that the road mentioned in the deed is the road as laid out in 1764, or not.

The demandant also contends that this ruling became immaterial by reason of the verdict. The jury found for the demandant as to that portion of the demanded premises which lies easterly of the brown line marked by the jury on a plan, which

brown line the verdict states "is the centre line of the old road, and is the westerly boundary line of the demandant's land." The demandant contends that the old road mentioned in the verdict is not the road as laid out in 1764, but the road actually travelled, when Timothy M. Stoughton conveyed the premises to Nathaniel Holmes and David A. Wood, by deed dated April 10, 1869, and that the centre line of this road was easterly of the easterly side of the road as laid out in 1764.

It is not distinctly stated whether the tenants admitted or denied that there was a road actually travelled from 1805 to 1870, which lay easterly of the road as laid out in 1764. If there were such a road, and this is the road mentioned in the verdict, and if the centre line of it lay easterly of the easterly side of the road as laid out in 1764, and the road as thus laid out was the road referred to in Smalley's deed, then it is immaterial whether this deed conveyed to the centre line of this road, or only to the easterly and northerly side of it. It was a question of fact, however, whether there was such a road easterly of the location of 1764, and also a question of fact where on the ground the road of 1764 was located, and whether this location included the demanded premises, or any part of them; and we cannot see that the tenants conceded that the contention made by the demandant in these respects was true, or that it necessarily follows from any conceded facts that this contention was true, and therefore we cannot say that the ruling of the court which we have held to be erroneous was rendered immaterial by the verdict. There is no suggestion in the exceptions, that the court considered that it was or had become immaterial.

The exceptions state that "the case was tried on the plea of nul disseisin alone." This put in issue the title of the demandant. The demandant put in evidence a lease from Holmes and Wood, duly recorded, and dated May 11, 1872, whereby a tract of land was demised by them to the Turner's Falls Lumber Company, one of the tenants in this action, for a term of twenty years from October 3, 1867, and he contended "that the premises described in said lease were the same sought to be recovered in this action." "The court, upon the request of the demandant, ruled, as matter of law, that the tenant, the Turner's Falls Lumber Company, could not dispute the title of the landlord in

this action to so much of the demanded premises as was included in said lease, while occupying the same under said lease, and that, in order to enable the lessee to dispute the landlord's title to the premises included in said lease, the tenant must either surrender said lease, or disclaim to hold under it, or show that it was induced to enter into it through fraud or mistake."

The demandant's chain of title was as follows: Two deeds of William Smalley to Reuben Shattuck, both dated February 4, 1795. The title conveyed by these deeds passed by mesne conveyances to Timothy M. Stoughton, on or before June 15, 1839. Stoughton conveyed the premises to Holmes and Wood by deed dated April 10, 1869, and on the same day Holmes and Wood conveyed the same premises in mortgage to Stoughton, who, on March 22, 1877, assigned the mortgage to Peleg Adams, and Adams, on March 18, 1882, sold the same, under a power contained in the mortgage, to the demandant, and on April 1, 1882, delivered a deed to him. Holmes and Wood executed the lease to the Turner's Falls Lumber Company on May 11, 1872. At this time Holmes and Wood were mortgagors, and Stoughton was mortgagee, and the demandant has Stoughton's title.

The demandant is Julian Holmes, a different person from Nathaniel Holmes, who was one of the lessors. The demandant in bringing this writ of entry to recover possession of the land, if it is included in the lease, must deny that the lease is good against him, on the ground probably that a lease by a mortgagor does not convey an interest in the land as against a prior mortgagee. There is no evidence that the demandant has ever recognized the Turner's Falls Lumber Company as his tenant, and the demandant by his suit elects to treat the tenant as a disseisor. The lessee is not, by virtue of the lease and by occupying under it, a tenant of the demandant, nor is the demandant his landlord. The demandant claims by a title paramount to that of the lessee, and the lessee cannot set up the lease as a defence to this suit, and it is not estopped by the lease from disputing the demandant's title. If the lessor, or any person claiming under the lessor by a title subsequent to the date of the lease, had brought suit against the lessee to recover the rent, the lessee while occupying under the lease could not dispute the sufficiency of the plaintiff's title. A prior mortgagee might enter, and the tenant

might attorn to him, and this would be a good defence to an action by the mortgagor, or those claiming under him, for rent accruing subsequently to the entry; the lessee would thus become the tenant of the mortgagee; but until such an entry, and until the lessee attorns to the mortgagee, or until the mortgagee requires the lessee to pay rent to him, the mortgagee and the lessee are strangers. The ruling given cannot be sustained. *Smith v. Shepard*, 15 Pick. 147. *Welch v. Adams*, 1 Met. 494. *Massachusetts Hospital Life Ins. Co. v. Wilson*, 10 Met. 126. *Russell v. Allen*, 2 Allen, 42. *Haven v. Adams*, *ubi supra*. *Ellis v. Boston, Hartford, & Erie Railroad*, 107 Mass. 1, 36. *Cook v. Johnson*, 121 Mass. 326. *Exceptions sustained.*

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#### COMMONWEALTH vs. SAMUEL CHADWICK.

Worcester. October 4. — 23, 1886. DEVENS & W. ALLEN, JJ., absent.

A complaint alleged that the defendant, at a time and place named, sold intoxicating liquor "without any authority therefor." At the trial, a witness for the government testified that he knew where the defendant kept a place, and that he saw a sale of liquor there after eleven o'clock in the evening of the day in question, but that he could not identify the defendant. It was admitted that the defendant was the proprietor of the place where the sale was made, and had a license of the first class, under the Pub. Sta. c. 100, to do business thereat. The government rested its case; and the defendant asked the judge to rule that there was no evidence upon which the jury could find the defendant guilty. The judge refused so to rule, and ruled that there was such evidence. The defendant then introduced evidence tending to show that no sale was made after eleven o'clock. There was evidence tending to show that the defendant kept a public bar; and that the sale testified to was made over said bar. The defendant repeated his previous request for a ruling, which was again refused; and the judge instructed the jury that the alleged sale must have been made by the defendant, or under his sanction or authority, and that, if so made after eleven o'clock at night, or if so made over a public bar before that hour, they might find the defendant guilty. *Held*, that the defendant had no ground of exception.

COMPLAINT to the Second District Court of Eastern Worcester, alleging that the defendant, on July 5, 1886, at Clinton, "without any authority therefor," sold intoxicating liquor to a person unknown. Trial in the Superior Court, on appeal, before



*Blodgett, J.*, who allowed a bill of exceptions, in substance as follows :

The government called one Kenney as a witness, who testified, in substance: "I know where the defendant keeps a public place on Main Street in Clinton. I was there on July 5, and I saw liquor sold there on that day between eleven fifteen and eleven thirty, P. M. I did not go in. There was a wire screen door through which I looked. The lights were a little dim. Three men stood in front of the bar, one man leaning on the bar. This man called for lager beer. The man behind the bar furnished it, and it was paid for."

On cross-examination, the witness testified that he saw one of the men before the bar take money out and lay it on the counter; that at least it looked like money and sounded like it; that he was about twenty feet away, and knew none of the parties; that he did not know, and could not identify, the defendant; that the sale he testified to in the lower court was the same sale, and was a sale made after fifteen minutes past eleven on the night in question; and that, at said trial, there was no evidence of any other sale.

It was admitted that the defendant was the proprietor of the place where the sale was alleged to have been made, and had a license of the first class, under the Pub. Sts. c. 100, to do business thereat.

The government rested its case; and the defendant asked the judge to rule that there was no evidence upon which the jury could find the defendant guilty. But the judge refused so to rule, and ruled that there was such evidence.

The defendant offered the evidence of himself and other witnesses tending to show that he was at said place of business during the evening in question, but that, at eleven o'clock, he himself extinguished the lights therein and closed and locked the door thereof; that he did not open or enter the saloon again that night, or know that it was so entered or opened; that he had no agent or servant authorized so to do; and that he sat at said door for a long time after eleven o'clock.

There was evidence tending to show that the defendant kept a public bar; and that the sale testified to by Kenney was made at and over said bar.

The defendant asked the judge to rule that there was no evidence in the case which would warrant the jury in finding the defendant guilty of an illegal sale of intoxicating liquor, as alleged. But the judge refused so to rule.

In the course of his argument, the district attorney contended that, if the jury found that the witness Kenney was mistaken as to the time of the sale to which he testified, they might find such sale to have been made before eleven o'clock, and that the defendant kept a public bar, and was therefore guilty.

The judge instructed the jury that the sale alleged must have been made by the defendant, or under his sanction or authority; and that, if so made after eleven o'clock at night, or if so made over a public bar before that hour, they might find the defendant guilty.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*J. W. Corcoran & H. Parker*, for the defendant.

*E. J. Sherman*, Attorney General, for the Commonwealth.

FIELD, J. The defendant's license was subject to the conditions, that "no sale of spirituous or intoxicating liquor shall be made between the hours of eleven at night and six in the morning; nor during the Lord's day, except," &c.; and that he "shall not keep a public bar." Pub. Sts. c. 100, § 9, cl. 2, 5. St. 1885, c. 90, § 1.

The government's witness testified that the sale he testified to in the lower court was the same sale he testified to in the Superior Court; but the defendant's evidence tended to show that no sale was made after eleven o'clock. Whether the sale was made before or after eleven o'clock at night, it was the same sale which was put in evidence in both courts, and it was equally an offence, whether, in making this sale, the defendant violated one or two of the conditions of his license. The defendant was charged with selling, on July 5, 1886, intoxicating liquor, "without any authority therefor." The form of the complaint was sufficient, because, if the defendant sold the liquor over a public bar, or after eleven o'clock at night, his license did not give him any authority to make such a sale. *Commonwealth v. Davis*, 121 Mass. 352. *Commonwealth v. Rogers*, 135 Mass. 536. *Commonwealth v. Salmon*, 136 Mass. 431. *Commonwealth v. Everson*, 140 Mass. 292.

The presiding justice was not required to rule upon the government's evidence, if the defendant intended to introduce other evidence; and no exception lies to the refusal to rule that the evidence of the government was insufficient, if other evidence was afterward offered by the defendant. But the court also ruled that there was evidence introduced by the government upon which the jury could find the defendant guilty. The admission by the defendant that he was the proprietor of the place, and had a license of the first class "to do business thereat," and the testimony that the defendant kept the place, were evidence for the jury that sales made in it were made by him or by his authority. *Commonwealth v. Mead*, 140 Mass. 300. *Commonwealth v. Leighton*, 140 Mass. 305. *Exceptions overruled.*

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JOHN MILLER vs. TIMOTHY SHAY.

Worcester. October 4. — 23, 1886. DEVENS & W. ALLEN, JJ., absent.

In an action for the price of a quantity of sand sold by the plaintiff to the defendant, it appeared that the only account which was kept of the sand was kept by the plaintiff by making straight marks in a blank book, from reports made to him by his men who drove his teams; and that the plaintiff could not read or write, and could not tell how many loads were drawn, of his own knowledge, except by counting the marks in said book. The defendant offered to prove how much sand was actually delivered by the plaintiff, by showing how many casks of lime were used by the defendant, and how much sand was used with each cask in performing the work done by the defendant with the plaintiff's sand, by actual count by the men who made the mortar and mixed the lime with the sand drawn by the plaintiff. He also offered to show by experts how much sand is used with a cask of lime in making such mortar as the defendant used with sand furnished by the plaintiff, no actual count being made or kept by the defendant otherwise. The evidence offered was excluded. *Held*, that the evidence first offered should have been admitted; and that, if the sand was all used in making mortar, and if the mortar was all of the same or a similar quality, and the witnesses had examined the mortar, the evidence of the experts offered was admissible, provided they could testify that the quantity of sand could be determined in this manner.

CONTRACT, upon an account annexed, for two hundred and fifty-three loads of sand, sold by the plaintiff to the defendant.

Trial in the Superior Court, before *Bacon, J.*, who allowed a bill of exceptions, in substance as follows:

It appeared from the plaintiff's evidence, that the only account which was kept of the sand was kept by the plaintiff by making straight marks in a blank book; and that the plaintiff put the marks down in said book from reports made to him by his men who drove his teams. It also appeared that the plaintiff could not read or write, and could not tell how many loads were drawn, of his own knowledge, except by counting the marks in said book.

The defendant, in opening his defence, stated that he did not have any confidence in the account of the plaintiff thus made up; and proposed to show how much sand was actually delivered by the plaintiff to the defendant, by showing how many casks of lime were used by the defendant, and how much sand was used with each cask in performing the work done by the defendant with the plaintiff's sand, by actual count by the men who made the mortar and mixed the lime with the sand drawn by the plaintiff. He also offered to show by experts how much sand is used with a cask of lime in making such mortar as the defendant used with sand furnished by the plaintiff, no actual count being made or kept by the defendant otherwise. The price per load was not in dispute.

The judge ruled that this mode of ascertaining the number of loads of sand delivered was not admissible, as too remote, and would not constitute a defence as to the number of loads delivered. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

*W. A. Gile*, for the defendant.

*T. G. Kent*, for the plaintiff.

FIELD, J. We understand that the defendant, in order to prove the quantity of sand furnished by the plaintiff, offered to show, by the men who made the mortar, how much sand was used with each cask of lime, and how many casks of lime were used in making the mortar, and that all the sand furnished was used for this purpose. This evidence should have been admitted. The defendant also offered the evidence of experts to show "how much sand is used with a cask of lime in making such mortar as the defendant used with sand furnished by the

plaintiff, no actual count being made or kept by the defendant otherwise." If the sand was all used in making mortar, and if the mortar was all of the same or a similar quality, and the witnesses had examined the mortar, we see no objection to admitting this testimony, provided the experts could testify that the quantity of sand could be determined in this manner. A case might easily be supposed in which no account had been kept by anybody of the quantity of sand used in making mortar, and all the evidence on each side must be of this character, if any evidence is to be admitted.

*Exceptions sustained.*

## SUPPLEMENT.

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### OPINION OF THE JUSTICES TO THE SENATE AND HOUSE OF REPRESENTATIVES.

The twenty-second amendment to the Constitution of the Commonwealth requires the Commonwealth to be divided by the General Court into senatorial districts according to the boundaries of towns and cities and the wards thereof, as they existed on the first day of May in the year in which the census of legal voters is taken that applies to said apportionment and division.

The twenty-first amendment to the Constitution of the Commonwealth requires the aldermen of the city of Boston, and the county commissioners of the other counties than Suffolk (in case no special commissioners are provided therefor), to divide the assignments of representatives to the several counties apportioned by the Legislature, according to the boundaries of the towns and cities and their wards, as they existed on the first day of May in the year in which the census of the legal voters is taken that applies to said apportionment and division.

ON May 21, 1886, the following order was passed by the Senate and by the House of Representatives, and was transmitted on the following day to the Justices of the Supreme Judicial Court, who, on May 28, returned the answer which is subjoined.

Whereas, in the year eighteen hundred and sixty-five the Legislature did pass an act entitled "An act empowering cities to re-establish their wards,"\* which act has ever since been in force, and divers cities in the Commonwealth have re-established their wards according to the provisions of said act; and

Whereas, divers cities and towns have been incorporated and organized under and by virtue of certain acts of the Legislature relating thereto; and

Whereas, the General Court at its present session is required to divide the Commonwealth into senatorial districts, and to provide for the apportionment and division of the Commonwealth

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\* St. 1865, c. 7.

into representative districts, and to this end has certain bills, orders, and other proceedings now pending before it relating thereto; and

Whereas, the authority to make such apportionments and divisions, according to the territorial boundaries of towns and cities, and their wards, as now existing and established, or hereafter to be established, under said acts of the Legislature, is brought into question, and the constitutionality thereof disputed; therefore, it is

Ordered by the General Court, in each branch thereof, that the opinion of the Justices of the Supreme Judicial Court be required upon the following important questions of law:

First. Does the Constitution in the twenty-second amendment thereof require the Commonwealth to be divided by the General Court into senatorial districts, according to the boundaries of towns and cities and the wards thereof, as they existed on the first day of May in the year in which the census of legal voters is taken that applies to said apportionment and division?

Second. Does the Constitution in the twenty-first amendment thereof require the aldermen of the city of Boston, and the county commissioners of the other counties than Suffolk (in case no special commissioners are provided therefor), to divide the assignments of representatives to the several counties apportioned by the Legislature, according to the boundaries of the towns and cities and their wards, as they existed on the first day of May in the year in which the census of the legal voters is taken that applies to said apportionment and division?

Third. Under the terms of the twenty-second amendment to the Constitution, can the General Court, in making the apportionment of senators and in the division of the Commonwealth into districts therefor, recognize and take as a basis for the same the towns incorporated or organized after the first day of May of the year in which the census of legal voters is taken that applies to such apportionment or division, or the wards in cities which have been established under the general law, being chapter seven of the acts of the year eighteen hundred and sixty-five, or under any other law, special or general, relating thereto, after the first day of May of the year in which the census of legal voters is taken that applies to such apportionment or division?

Fourth. Under the terms of the twenty-first amendment to the Constitution, can the aldermen of the city of Boston, and the county commissioners of the other counties than Suffolk (in case no special commissioners are provided therefor), in making the division into representative districts, recognize or take as a basis therefor the towns incorporated or organized after the first day of May of the year in which the census of legal voters is taken that applies to said apportionment or division, or the wards in cities which have been established under the general law, being chapter seven of the acts of the year eighteen hundred and sixty-five, or under any other law, special or general, relating thereto, after the first day of May of the year in which the census of voters is taken that applies to said apportionment or division?

The Justices of the Supreme Judicial Court, having considered the questions proposed in the joint order of the twenty-first of May present, respectfully submit the following opinion.

The twenty-second article of amendment of the Constitution provides that "a census of the legal voters of each city and town, on the first day of May, shall be taken and returned into the office of the Secretary of the Commonwealth, on or before the last day of June, in the year one thousand eight hundred and fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter. In the census aforesaid, a special enumeration shall be made of the legal voters, and in each city said enumeration shall specify the number of such legal voters aforesaid, residing in each ward of such city. The enumeration aforesaid shall determine the apportionment of senators for the periods between the taking of the census. The Senate shall consist of forty members. The General Court shall, at its first session after each next preceding special enumeration, divide the Commonwealth into forty districts of adjacent territory, each district to contain, as nearly as may be, an equal number of legal voters, according to the enumeration aforesaid: provided, however, that no town or ward of a city shall be divided therefor."

The first and third questions proposed to us are whether, in dividing the Commonwealth into senatorial districts, the General



Court must be governed by the boundaries of the towns and wards as they existed on the first day of May of the year in which the census is taken, or whether they can make such division according to the boundaries of towns and wards as they exist at the time of the division, if there has been any change in such boundaries since the first day of the next preceding May.

We have no doubt that the amendment imposes upon the General Court, in each tenth year, the duty of providing by suitable legislation that a census and enumeration of legal voters shall be taken and returned into the office of the Secretary of the Commonwealth. The great object of the amendment was to establish the Senate upon the basis of legal voters, and to provide for a method of ascertaining the number of legal voters, so as to furnish a guide to the General Court in dividing the State into senatorial districts. The fundamental idea is, that an enumeration shall be made under the authority and direction of the Commonwealth, and that this enumeration alone shall guide the General Court in making the division. Such enumeration must "determine the apportionment of senators," and the division must be made "according to the enumeration aforesaid." The General Court is to be governed entirely by this enumeration, and is not at liberty to look to any other source for information as to the number of legal voters in any territory which it proposes to erect into a senatorial district. It must act upon the enumeration returned to the office of the Secretary of the Commonwealth, and by him laid before the Legislature.

The provision that the enumeration shall specify the number of legal voters in each ward of a city necessarily refers to each ward as it existed on the first day of May; and the accompanying provision, that "no town or ward of a city shall be divided," we think by its fair construction refers to such town or ward, that is, the town or ward as it existed on the first day of May of the year in which the census is taken.

The intention of the framers of the amendment seems to have been to establish such town or ward as a unit of division. The scheme was to ascertain the number of voters in each town and ward as found on the first day of May, and then, as soon as could be thereafter, to divide the State into senatorial districts according to that enumeration. It regards the apportionment as a

continuing act or process, beginning with the enumeration of voters in the several towns and wards, and ending with the assignment of the same towns and wards to senatorial districts. There seems to be no reason for requiring the enumeration by wards as they exist on the first day of May, unless such enumeration is to regulate the division into districts.

If a town is divided, or the wards of a city are changed, after the first day of the preceding May, and before the time when the division is made, the Constitution does not furnish the General Court with the means of ascertaining the number of voters who resided in the new town or ward on the first day of May. If the division is to be made according to the boundaries of the new towns or wards, how is the General Court to ascertain the number of legal voters in such new towns or wards? The official returns, which are by the Constitution the only basis upon which it can act, do not show it. It might perhaps, by other means, more or less to be relied on, ascertain approximately the number, but this would be a violation of the provision that the official enumeration shall determine the apportionment.

The Constitution does not intend that the apportionment of senators, which affects the people of the whole State, shall be determined by any enumeration taken by officials of cities or towns, or by the number of voters ascertained in any other mode than that which it provides. On the contrary, as we have before said, it does clearly intend that the official enumeration, taken and returned to the office of the Secretary of the Commonwealth under the authority of, and by officers of, the Commonwealth, shall be the sole guide of the General Court in making the apportionment.

We are therefore of opinion, that, by the sound construction of the twenty-second article of amendment, the General Court is required to divide the State into senatorial districts according to the boundaries of the towns and wards as they existed on the first day of May last.

If the question were a new one, we should have adopted this construction without any hesitation. We have considered the subject with more care, because the fact cannot be overlooked that, in apportioning the senators in the years eighteen hundred

and sixty-six\* and eighteen hundred and seventy-six,† the General Court proceeded upon a different construction of the twenty-second amendment. It is true, that, when a provision of the Constitution is obscure and doubtful, the construction adopted by the Legislature, or any other department of government, is entitled to great weight. But the Constitution is supreme, and no number of legislative acts will justify a construction against its plain meaning.

The provision we are considering is intended to be permanent, and we think that its meaning is reasonably clear, and that the construction implied in acts of previous Legislatures ought not to control our opinion.

Nor do we overlook the fact, that a division according to the old wards in the city of Boston will, so long as the present statutes remain in force,‡ lead to the inconvenience that there will be one system of wards for the purposes of electing councillors, senators, and representatives, and a different system of wards for all other purposes. But this is an inconvenience which is not an incident of or created by the constitutional provision. It is the result of subsequent legislation and can be cured by legislation. An inconvenience thus created cannot be of weight in determining the true construction of the constitutional provision.

The twenty-first amendment, so far as the provisions we are considering are concerned, is in substance, and very nearly in language, the same as the twenty-second, and must receive the same construction.

It follows, that the first and second questions proposed to us must be answered in the affirmative, and the third and fourth questions in the negative.

MARCUS MORTON.

WALBRIDGE A. FIELD.

CHARLES DEVENS.

WILLIAM ALLEN.

CHARLES ALLEN.

OLIVER WENDELL HOLMES, JR.

WILLIAM S. GARDNER.

May 27, 1886.

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\* St. 1866, c. 120.

† St. 1876, c. 190.

‡ Pub. Sts. c. 28, § 14. St. 1884, c. 181, § 9.

# INDEX.

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## ACCOMPLICE.

In a criminal case, the testimony of a witness was admitted, without objection, as corroborating the testimony of an accomplice of the defendant. The defendant requested the judge presiding at the trial to instruct the jury that the testimony of the accomplice should be corroborated in some material fact. The judge gave this instruction. The defendant further asked the judge to rule that the evidence of the other witness afforded no such corroboration, but, on the contrary, was contradictory and conflicting, and, if the jury found it to be so, it was their duty to acquit. The judge refused so to rule. *Held*, that the defendant had no ground of exception. *Commonwealth v. Lynes*, 577.

## ACCOUNT.

See CONSIGNOR AND CONSIGNEE.

## ACCOUNT ANNEXED.

See TENANT IN COMMON.

## ACTION.

1. In an action by an insurance company against its agent for failure to cancel a policy, as directed, it appeared that, by the terms of the policy, the plaintiff had sixty days after proofs of loss in which to pay the amount due thereunder; that the writ was dated on the same day upon which the proofs of loss on the insured property were made; and that the loss was paid by the plaintiff before the expiration of sixty days therefrom. It was admitted that the loss was fairly adjusted, and that the plaintiff was liable under its policy for the full amount paid by it. *Held*, that the action was not prematurely brought. *Phoenix Ins. Co. v. Friswell*, 518.
2. If a statute authorizes an aqueduct corporation to take and use the waters of certain ponds to supply the inhabitants of a town with water, and to enter upon and take any lands necessary for maintaining its works for this purpose, and provides that damages sustained thereby may be recovered

in the manner provided where land is taken for highways, and that nothing in the act shall authorize the corporation to raise the water of any of said ponds above high-water mark, nor to drain any of them below low-water mark, and the corporation, in proceeding under the statute, violates this last provision, and causes damage to a landowner, the latter may maintain an action of tort against the corporation therefor; and it is immaterial that the land so injured is situated in another State. *Brickett v. Haverhill Aqueduct*, 394.

3. If a check made in this Commonwealth, and payable to a resident of another State, is deposited by him in a bank there, where he has a general account, under an agreement that all checks drawn on banks in other places shall be passed to his credit on the day of deposit, but, if they are returned unpaid, they shall be charged to his account, and by the law of that State the bank is not his agent in collecting the check, but becomes the owner of it, with the right of charging it back to his account if it is not paid by the bank on which it is drawn, the receiver of the bank, which suspends business on the day of such deposit, may maintain an action for the amount of the check against the maker, who cannot avail himself, in defence, of the fact that, upon such suspension, the payee of the check stopped payment of the same. *Brooks v. Bigelow*, 6.
4. A. employed B. to sell his goods at prices not less than minimum prices, so called. B. sold goods to C., who knew of the limitations of B.'s authority, upon an agreement that he should settle with him for the goods at prices less than those limited. B. then sent an order for the goods to A., with the minimum prices marked thereon. A., who was ignorant of the agreement between B. and C., delivered the goods to C. with a bill of parcels containing the minimum prices, at which also the goods were charged to C. on A.'s books; and C. made no objection to the bill. C. settled with B. for the goods, according to their agreement, at less than the minimum prices; and B. reported to A. that he had received payment of the amount stated in the bill of parcels. A. credited C., and charged B., with this amount on his books; and A. never had a final settlement with B. *Held*, that A. could maintain an action of contract against C. for the difference between the amount of the bill of parcels and the amount paid by C. to B.; and that A. had not, by novation, accepted B. as his creditor. *Rogers v. Holden*, 196.
5. A declaration alleged that the plaintiff delivered to the defendant, to be held and safely kept by him, certain shares of stock in a corporation, as collateral security for the payment of a promissory note signed by the plaintiff, with authority to sell the same and apply the proceeds towards the payment of the note, in case of default in the payment thereof by the plaintiff; that the defendant, in consideration of such pledge and delivery by the plaintiff, promised and undertook to hold and keep said stock, and redeliver the same to the plaintiff on payment of the note; that, on or before the maturity of the note, the plaintiff, in order to provide for the payment of the note at maturity, had effected a valid contract for the sale of said stock at a certain price per share, the stock to be delivered and assigned on or after maturity of the note; that, at the maturity of the

note, the plaintiff was ready and willing to pay said debt and receive back the stock, and offered to redeem the same, and demanded the same of the defendant, who informed him that the note and certificates had been lost, and that it was out of his power to return either the note or the certificates; that the defendant refused and neglected for a long time to return said certificates to the plaintiff, or permit him to redeem the same; that, by reason of said loss, refusal, and neglect, the plaintiff lost his said sale and the benefit thereof, and was deprived of his right to sell the same, as he could have done; that, about fifteen months after the maturity of the note, said stock was found by the defendant, and the debt to him discharged, and the stock received back by the plaintiff, and sold by him at a greatly diminished price, whereby he had suffered the loss of a certain sum, which was caused solely by the defendant's neglect to keep safely the property so pledged as collateral security. *Held*, on demurrer, that the declaration did not state a legal cause of action. *Cumnock v. Newburyport Savings Institution*, 342.

6. In an action of tort against a city for flooding the plaintiff's land, the plaintiff's evidence tended to show that the defendant constructed a drain along a street, and thence through a private way to a catch basin near the rear of the plaintiff's land; that the object of the drain was to carry off surface water, a portion of which naturally ran away from the plaintiff's land; that in the rear of this land was a small brook or ditch; that the water in wet seasons overflowed the catch basin, rose to the surface of the ground, ran into the brook, and did the injury complained of; and that the ditch or brook ran under a street through a culvert which was insufficient in size and choked up, and thereby water was backed upon the plaintiff's land. The evidence for the defendant contradicted the facts and causes of damage alleged by the plaintiff. The plaintiff asked the judge to instruct the jury that the defendant could not lawfully collect water not naturally coming near the plaintiff's land, and, conducting it by an artificial channel, precipitate it upon his land; that, if the ditch was a natural watercourse, the defendant was bound to make a suitable culvert for it under the street, for the passage of water which might naturally come there or be brought there by the defendant's acts; that, if the culvert had been maintained by private persons for more than twenty years, it was the duty of the defendant to see that it was not obstructed, even if the waters were not those of a natural stream. The judge declined so to rule, and instructed the jury that the defendant had no right to go beyond the limits of its highways for the disposal of surface water, without the permission of the adjoining proprietors; that, if the owners of the private way assented, the defendant might place the drain therein, and, with the assent of the owners of the land, conduct the water to the ditch and culvert, and the plaintiff could not complain unless he was a riparian proprietor on the brook; that, if the plaintiff was not such proprietor, he could not complain that the brook was so interfered with that the water which flowed into it could not flow out of it; and that, if the defendant improperly constructed the drain, and so negligently maintained it, either by itself or in connection with the culvert, that the plaintiff sustained an

injury, he could recover. *Held*, that the plaintiff had no ground of exception. *Stanchfield v. Newton*, 110.

See DAMAGES, 2; EXECUTOR AND ADMINISTRATOR; FRAUDS, STATUTE OF, 2; INSOLVENT DEBTOR, 2; INSURANCE, 3-5; INTOXICATING LIQUORS, 2; LIMITATIONS, STATUTE OF; MASTER AND SERVANT, 1; PRINCIPAL AND AGENT, 2; RAILROAD, 3, 5; REPLEVIN; SHIP, 1, 3; TROVER, 1.

#### ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

#### ADMISSION.

See EXCEPTIONS, 10.

#### ADULTERY.

See DIVORCE.

#### ADVERSE POSSESSION.

In an action for breaking and entering the plaintiff's close, brought in 1883, it appeared that the plaintiff, in 1852, took possession of the land under a deed purporting to convey the same, and cut off all the wood and timber thereon; that the land was woodland when cut over by the plaintiff, and had been left to grow up to wood, and, at the commencement of the action, consisted of sprouts, about one acre of pasture, and some wet land, and all of it had been occupied by the defendant's cattle more or less since 1852; that it was entirely surrounded by the defendant's land; that the defendant had fenced his own land, and had thus included, within the fence, the plaintiff's land; that the defendant had used the lot as a pasture and place for his cattle to run, feed, and drink upon, without any hindrance or objection made by any one for more than twenty years; and that the defendant had also repaired a road through the plaintiff's land, and had used the road in going to and from his own land, and had from time to time, from 1856 to 1877, cut one or two cords of wood upon the plaintiff's land, and had allowed it to remain on the land for some time before taking the same away, so that it could be seen by any one. The defendant testified that he claimed this lot as his own since 1856 or 1857; and that he ever since had had full and exclusive possession and control of the same, unmolested by any one. *Held*, that the evidence did not tend to show a title to the land in the defendant by adverse possession, as against the plaintiff's prior title. *Richmond Iron Works v. Wadhams*, 569.

See RAILROAD, 2; WAY, 3-7.

#### AGE.

See EVIDENCE, 15.

## AGENT.

See PRINCIPAL AND AGENT.

## ALTERATION OF INSTRUMENTS.

See PROMISSORY NOTE, 1.

## AMENDMENT.

See PRINCIPAL AND SURETY.

## ANSWER.

See CONSIGNOR AND CONSIGNEE.

## APPEAL.

If, at the time of taking an appeal to the Superior Court in a criminal case, a statute has been enacted and approved, but has not taken effect, providing for a new term of the Superior Court, to be held at an earlier day than the term then provided for by law, an appeal to such new term is not a ground for an arrest of judgment in the Superior Court. *Commonwealth v. Stevens*, 457.

See BOND, 2.

## APPRENTICE.

See GIFT, 2.

## ARREST.

See DAMAGES, 1; POOR DEBTOR, 1, 2.

## ARREST OF JUDGMENT.

See APPEAL.

## ASSAULT.

At the trial of an indictment against three persons for assaulting A., a constable and police officer of a certain town, while in the execution of the duties of his office, A. testified that he was appointed a special police officer of the town; that he was patrolling the highway, at the time of the alleged assault, in company with B., another special police officer; that when they arrived at a point opposite the hotel of C., A. was accosted by C., who, after asking the officers if they had any business at his house, struck B., and B. and C. then clinched and engaged in a struggle; that thereupon A. advanced toward the combatants to assist B., when one of the defendants, who had not been seen or heard before, exclaimed, " Hold



on there, A., don't strike him;" that, immediately afterwards, another defendant seized A. and held him while the third defendant struck him, and one of the defendants seized A.'s billy, which he had drawn in assisting B.; that each defendant appeared separately, and was recognized by A. as he appeared. A.'s testimony was corroborated by B. There was also evidence tending to show that, among the duties for which A. and B. were appointed, was the surveillance of C.'s house, which was an unlicensed inn and a place of common resort; and that the defendants had lived in the town many years, knew A. and B. well, and were well known by them. The defendants admitted being in the vicinity at the time, but denied assaulting A., or knowing that the person assaulted was an officer. The judge instructed the jury that they might infer from the evidence that the defendants knew that A. was an officer, as alleged in the indictment, and that he was in the lawful execution of his office. *Held*, that the defendants had no ground of exception. *Commonwealth v. Sawyer*, 530.

See CONVICTION; DAMAGES, 1.

#### ASSIGNMENT.

1. An assignment, under seal, to a town, of a sum of money held in trust for the assignor, purporting to be "in consideration of one dollar and other valuable consideration," and the object of which is expressed to be to repay expenses incurred by the town for the support of the assignor as a pauper, and, if anything is left after paying for past charges, to pay for his support in the future, is valid. *O'Donnell v. Smith*, 505.
2. An assignment of a sum of money will not, after the death of the assignor, be held to be invalid, because, nine years before the execution of the assignment, the assignor was placed under guardianship as a spendthrift, if the person appointed guardian did not accept the office, although the decree of the Probate Court appointing him has not been revoked. *Id.*

See EQUITY, 1, 3, 11; INSOLVENT DEBTOR, 3; MORTGAGE, 2.

#### ASSUMPSIT.

See GUARANTY, 1.

#### ATTACHMENT.

See EQUITY, 3, 8, 11; INSOLVENT DEBTOR, 3; MORTGAGE, 3.

#### ATTORNEY AND COUNSEL.

The authority of an attorney at law to collect a debt does not cease on his obtaining a judgment and execution, and if, by his procurement, or that of his clerk acting within the general scope of his employment, the judgment debtor is illegally arrested, the principal of the attorney is liable therefor. *Shattuck v. Bill*, 58.

See FALSE IMPRISONMENT.

## ATTORNEY GENERAL.

See INFORMATION.

## AUDITOR.

1. If an action for goods sold and delivered is referred to an auditor, whose report does not set out the evidence, but finds that charges for boxes, barrels, packing, and carting were on the bills of parcels sent with the goods, to which no objection was made at the time, and were in accordance with a custom of merchants, this court will not sustain an objection that no recovery can be had for the same. *Rogers v. Holden*, 196.
2. If an action for goods sold and delivered is referred to an auditor, who does not report the evidence, his finding, allowing all the items of the account, including those which did not accrue within six years before the date of the writ, if he finds no fact in conflict therewith, is final, the case being tried on the auditor's report alone. *Id.*

## BANK.

See ACTION, 3.

## BASTARD.

At the trial of a complaint under the bastardy act, Pub. Sta. c. 85, if the complainant testifies that the respondent got her with child in a certain month, and the respondent introduces evidence tending to show that, in that month, a third person spent part of an evening with the complainant under circumstances which naturally excite suspicions that they had sexual intercourse with each other, evidence that, in the preceding month, the complainant and such person had an interview under suspicious circumstances, is admissible, within the discretion of the presiding judge. *Odewald v. Woodsum*, 512.

## BENEFICIARY ASSOCIATION.

The Pub. Sta. c. 115, § 8, provide that a beneficiary association may, "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto, and such fund shall not be liable to attachment by trustee or other process." An association was organized under the statute "for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of deceased members or to their heirs." One of its by-laws provided that the benefit payable at the death of a member should be applied to the payment of the expenses of his last sickness and funeral, if not otherwise paid, and "the balance shall be paid to the person or persons designated by the member

in his application for membership, or last legal assignment, provided such person or persons are heirs or members of the decedent's family." A member of this association, in his application for membership, designated his wife as the person to whom the benefit was to be paid upon his death. Afterwards he attempted to change the designation from his wife to his mother, who was not living with him, but who was living with her husband in another town and county. *Held*, that the attempted designation to the mother was invalid; that the original designation to the wife remained in force; and that she was entitled to the fund. *Elsey v. Odd Fellows' Association*, 224.

### BENEVOLENT INSTITUTION.

See **Tax**, 1.

### BOND.

1. The condition of a bond given to an attaching officer, to indemnify and save him harmless "of and from all suits, damages, and costs whatsoever, whereunto he may be liable, or obliged by law to pay to any person or persons, by reason of the said attachment," includes counsel fees reasonably incurred in the defence of an action occasioned by the attachment. *Lindsey v. Parker*, 582.
2. If, in an action on the Pub. Sts. c. 175, to recover possession of certain premises, brought in a district court, which has jurisdiction of the cause and of the parties, judgment is rendered for the plaintiff, from which the defendant appeals to the Superior Court, and gives a bond, with sureties, to prosecute his appeal, and the action is entered and tried in the Superior Court, which affirms the decision of the district court, to which exceptions are taken, heard, and overruled in this court, and final judgment for the plaintiff is entered in the Superior Court for possession of the premises, it is not open to the principal or sureties, in an action upon the bond, to question the validity of the judgment on the ground that the appeal should have been completed by a recognizance instead of a bond. *Granger v. Parker*, 186.
3. A trustee under a will gave a probate bond, with A. and B. as sureties. A. died, and D, who was a surety on another bond for the same principal as trustee of another estate, supposed that he was a co-surety with A. on the first-named bond, and petitioned the Probate Court to be discharged; and he was discharged accordingly. The trustee then gave another bond, in the same penal sum as the other, with B. and C. as sureties, which was approved by the judge of probate as "a new bond." The judge and the parties all acted under the same misapprehension as D. *Held*, that both bonds were valid; and that the sureties on each bond, after a breach thereof, were responsible in proportion to the several liabilities assumed by them. *Brooks v. Whitmore*, 399.

See **EXCEPTIONS**, 10; **EXECUTOR AND ADMINISTRATOR**; **PRINCIPAL AND SURETY**; **REPLEVIN**, 1; **TRUST AND TRUSTEE**, 2-6.

## BOUNDARY.

See DEED, 2, 3; GRANT.

## BURDEN OF PROOF.

See INTOXICATING LIQUORS, 6; WAREHOUSEMAN.

## BY-LAW.

See BENEFICIARY ASSOCIATION; INSURANCE, 1.

## CARRIER.

See PRINCIPAL AND AGENT, 1.

## CHARITABLE INSTITUTION.

See BENEFICIARY ASSOCIATION; TAX, 1.

## CHARITY.

See DEVISE AND LEGACY, 1; INFORMATION, 3.

## CHECK.

See ACTION, 3.

## CITY.

1. The power conferred by the St. of 1846, c. 167, § 11, and the St. of 1861, c. 105, § 13, upon the city council of Boston and Charlestown respectively to appropriate the surplus income arising from water rates to a sinking fund, and which, by the St. of 1875, c. 80, and an ordinance passed in pursuance thereof, became vested in the Boston Water Board, is not taken away by the St. of 1875, c. 209 (Pub. Sts. c. 29). *Minot v. Boston*, 274.
2. Under the St. of 1885, c. 323, the board of police of the city of Boston cannot remove an officer or member of the police, without assigning a cause for such removal, and giving to such officer or member an opportunity to be heard thereon. *Ham v. Boston Board of Police*, 90.
3. Under the Pub. Sts. c. 50, § 22, giving city authorities the power, in their discretion, to construct sidewalks, they may remove a sidewalk bordering on a paved street. *Attorney General v. Boston*, 200.
4. It is competent for the board of aldermen of the city of Boston to pass an order, directing the superintendent of streets to remove a sidewalk bordering on a paved street; and such order is not "executive" or "administrative," within the meaning of the St. of 1885, c. 266, § 6, vesting the "executive" power of the city government in the mayor, "to be

exercised through the several officers and boards of the city in their respective departments, under his general supervision and control," and giving to such officers and boards, in their respective departments, "the direction and control of all the executive and administrative business of said city." *Attorney General v. Boston*, 200.

5. The board of aldermen of the city of Boston passed an order, directing the superintendent of streets to remove a sidewalk on a paved street within a specified time, and to pave that portion of the street covered by the sidewalk so as to conform to the adjoining part of the street, "the expense thereof to be charged to the appropriation for paving." There had been an appropriation for the paving department, at the beginning of the year, of a certain sum for the objects and purposes explained in the recommendations of the committee on paving, which included new work on streets already laid out and on those which might be petitioned for, and for repairs and maintenance of streets and roads. The St. of 1885, c. 266, § 6, provided that "no expenditure shall be made nor liability incurred for any purpose beyond the appropriation duly made therefor." *Held*, that the order was valid. *Ib.*

See ACTION, 6; CONSTITUTIONAL LAW, 2, 3; EQUITY, 1, 7; INFORMATION, 1; TREE; WAY, 8-12.

#### COLLATERAL SECURITY.

See ACTION, 5; EVIDENCE, 12; PLEDGE.

#### COMMISSION.

See TRUST AND TRUSTEE, 5.

#### COMPLAINT.

1. A complaint on the Pub. Sts. c. 91, § 27, for unlawfully fishing in a certain pond, need not aver that the pond is a great pond or an artificial pond, nor that the defendant was not lawfully engaged in cultivating or maintaining said fish. *Commonwealth v. Richardson*, 71.
2. A complaint made by "Freewaldau C. Thayer," signed "F. C. Thayer, complainant," and certified by the clerk of the court to which it is addressed to have been "received and sworn to before said court," sufficiently appears to be signed and sworn to by the complainant. *Commonwealth v. Intoxicating Liquors*, 470.
3. The oath of one of the complainants, required by the Pub. Sts. c. 100, § 81, to authorize the issue of a warrant to search a dwelling-house for liquor, does not form a part of the complaint, although incorporated therein; and, at the trial to determine whether the liquor seized shall be forfeited, the government is not required to prove that intoxicating liquor has been sold in the house contrary to law within one month prior to the filing of the complaint. *Ib.*

See INTOXICATING LIQUORS, 3, 6-12.

## CONDITION.

See BOND, 1; EQUITY, 5.

## CONFLICT OF LAWS.

A promissory note, made and signed in another State, and payable there, although sent by mail to the payee in this Commonwealth, is executed in, and to be governed by the law of, the other State. *Shoe & Leather Bank v. Wood*, 568.

See INSOLVENT DEBTOR, 3.

## CONSIDERATION.

See GUARANTY, 2; PROMISSORY NOTE, 3.

## CONSIGNOR AND CONSIGNEE.

A., a manufacturer, had two mills, one of which was run under his own name, and the other under the name of B. He consigned goods to C., a commission merchant, under an agreement that C. should make advances, should sell the goods, and, after deducting his advances, with interest, and his expenses, charges, and commissions, should credit A. with the net proceeds. A. kept the accounts of each mill separate; and he consigned and invoiced the goods to C., who had no knowledge that A. was the sole owner, in the name under which each mill was run. C. brought an action against A., to recover the balance of an account current with the mill run under the name of A., to which the answer was a general denial, and payment. *Held*, that, under the pleadings, A. could not show that there was a balance due him upon the account in the name of B., which should be allowed in this action, or that there were in C.'s hands goods from the mill run in the name of A., which were not included in the account sued on. *Held, also*, that the expense of printing a part of the goods was properly charged to A., it being shown that this was done under the usage of commission merchants in like cases. *Talcott v. Smith*, 542.

## CONSPIRACY.

See EXCEPTIONS, 9.

## CONSTITUTIONAL LAW.

1. It is not contrary to the provisions of the Constitution of the United States for a State to enact a statute giving the maker of a negotiable promissory note the same defence as against an indorsee that he has against the payee, if the note is made in such State and is payable there. *Shoe & Leather Bank v. Wood*, 568.
2. The twenty-second amendment to the Constitution of the Commonwealth requires the Commonwealth to be divided by the General Court into

- senatorial districts according to the boundaries of towns and cities and the wards thereof, as they existed on the first day of May in the year in which the census of legal voters is taken that applies to said apportionment and division. *Opinion of Justices*, 601.
3. The twenty-first amendment to the Constitution of the Commonwealth requires the aldermen of the city of Boston, and the county commissioners of the other counties than Suffolk (in case no special commissioners are provided therefor), to divide the assignments of representatives to the several counties apportioned by the Legislature, according to the boundaries of the towns and cities and their wards, as they existed on the first day of May in the year in which the census of the legal voters is taken that applies to said apportionment and division. *Id.*
  4. The St. of 1867, c. 73, authorizing an aqueduct corporation to take and use the waters of certain ponds to supply the inhabitants of a town with water by an aqueduct, and to enter upon and take any lands necessary for laying and maintaining aqueduct pipes or other works necessary for that purpose, and providing that "all damages sustained by entering upon and taking land, water, or water rights, for either or any of the above purposes, shall, in case of disagreement with the parties injured, be ascertained, determined, and recovered in the same manner as is now provided in cases where land is taken for highways," makes, in connection with the general laws, adequate provision for compensation, and is constitutional. *Brickett v. Haverhill Aqueduct*, 394.

## CONTRACT.

### I. *Making.*

See GUARANTY, 1.

### II. *Consideration.*

See GUARANTY, 2; PROMISSORY NOTE, 3.

### III. *Validity.*

1. A. signed a subscription paper, whereby he and the other subscribers agreed to contribute the amounts set opposite their names for the purpose of purchasing the property of a mining corporation. As part of the same transaction, the promoter of the scheme secretly agreed, on behalf of the corporation, to give A. a certain number of shares of stock free of cost. This was to induce A. to be a subscriber, and to influence others to sign; and some of those who afterwards subscribed were in part induced to do so by seeing that A. was a subscriber. Subsequently, the scheme was given up, because enough subscribers were not obtained to buy the entire property, and another scheme was set on foot by the promoter, by which the persons who signed the former paper were to take shares of stock in the company. A. refused to have anything to do with it unless he could have the same advantage he would have derived had the prior arrangement been carried out; and the promoter agreed to this. No new papers were drawn up, and A. acted with the other subscribers to the original

paper in carrying out the new scheme, apparently on an equality with them, and intending that his subscription should be used to secure this result. *Held*, in an action brought by A. against the promoter of the scheme to recover the value of the shares of stock secretly bargained for, that these facts would warrant the jury in finding that the new secret agreement was void as in fraud of the other subscribers. *Nickerson v. English*, 267.

#### IV. Construction.

2. A. sent a postal card, signed by him, to B., containing the following: "Please send us pice of counter screen like draft." Upon this card was a draft of a counter screen with the measurements thereof. *Held*, in an action by B. against A. for the price of the goods named, that the writing presented a case of incurable uncertainty; and that the judge properly refused to submit it to the jury to determine whether the letters "pice" meant "piece" or "price." *Cheney Bigelow Wire Works v. Sorrell*, 442.
8. A. and B. executed an agreement, which provided that, in consideration of an assignment to B. by C. of all right, title, and interest in a certain invention and the letters patent previously assigned to C. by A., B., in part payment therefor, would pay to A. a certain sum "on each and every machine manufactured by said B., his agents, successors, or assigns, and containing said patented improvements or either of them," within a stated time after making returns to A. of the number of machines manufactured by B. or his agents. *Held*, that A. was entitled to the royalty named in the agreement upon machines bought of a person who was adjudged, in a suit by B., to have infringed the letters patent owned by B. in manufacturing the machines, and for the use of which in the future B. received payment from the persons so buying them. *Porter v. Standard Measuring Machine Co.* 191.

See RAILROAD, 1.

#### CONVERSION.

See TROVER.

#### CONVICTION.

A conviction for a simple assault may be had on an indictment which charges in one count a riot and an assault committed riotously. *Commonwealth v. Hall*, 454.

#### CORPORATION.

Shares of stock in a corporation are not necessarily extinguished by being transferred to the corporation, so that they cannot be reissued. *Commonwealth v. Boston & Albany Railroad*, 146.

See EQUITY, 10; GIFT, 2; GUARANTY; INFORMATION; INSURANCE, 1; MASTER AND SERVANT, 3, 4; MILL, 2; STATUTE, 2.



## COUNTY COMMISSIONERS.

See CONSTITUTIONAL LAW, 8.

## COSTS.

See BOND, 1; SCIRE FACIAS.

## COURT.

See PROBATE COURT; SUPREME JUDICIAL COURT.

## CUSTOM.

See AUDITOR, 1; CONSIGNOR AND CONSIGNEE; EVIDENCE, 5.

## DAM.

See MILL.

## DAMAGES.

1. In an action for an assault and battery, committed in arresting the plaintiff illegally, he is entitled to recover compensation for the loss of his time, and for the indignity suffered by him. *Morgan v. Curley*, 107.
2. If a deed of land reserves to the grantor, his heirs and assigns, "the spring of water on said premises, and the right to lay down, repair, and rebuild aqueduct and pipe, and convey said water off from said premises, together with the right to fix said spring and do any other act or thing necessary for taking off said water," and a grantee of the land subject to the reservation puts in an aqueduct, which diverts the water continuously, an owner of the right reserved to the grantor is entitled, in an action against such grantee for an interference with his rights, at least to nominal damages. *Peck v. Clark*, 436.

See EVIDENCE, 4; INTOXICATING LIQUORS, 2; WAY, 1-4.

## DECLARATION.

See PLEADING, II.

## DEED.

1. A conveyance of land in trust "for the benefit of A. for a homestead for his life, and for B. after the said A.'s decease, his heirs and assigns," gives B. a vested remainder in fee, which he can alienate in A.'s lifetime. *O'Donnell v. Smith*, 505.
2. The owner of a large tract of land laid out streets and passageways over it, divided it into lots, and caused a plan thereof to be made. He conveyed these lots to different grantees by deeds bounding them on the streets and passageways, and describing the lots by measurements which

excluded the streets and passageways. The deeds also referred to the plan, and conveyed to each grantee a right, as appurtenant to the lot conveyed to him, to use the passageways in common with the grantor and his assigns. *Held*, that each grantee took the fee to the centre of the street or passageway on which his lot abutted. *Gould v. Eastern Railroad*, 85.

3. If a deed describes the boundary line of a parcel of land as beginning at a certain point, and thence running across a road, and thence by the side of the road, title to the centre of the road does not pass, unless a contrary intent appears. *Holmes v. Turner's Falls Co.* 590.
4. A mortgage made by A. embraced four different parcels of land. Each of the first three parcels was described separately by a general description referring to the deeds, recorded in a certain registry, by which it was conveyed to him, with an exception of the lots embraced in such parcel which had been previously conveyed by the mortgagor. The fourth parcel was described as "the land by me owned" in a certain locality; "for boundaries and description reference is made to deeds to me recorded in said registry;" and the deed did not in terms except lots in this locality previously conveyed. In fact, the mortgagor had previously conveyed a portion of the fourth parcel by a deed which was not recorded until after the mortgage was recorded. *Held*, that such portion did not pass by the mortgage. *Fitzgerald v. Libby*, 235.
5. A. and B. entered into an indenture, by which A. granted to B., his heirs and assigns, the right to build a mill or mills, and the "privilege to draw and use the water from the mill-pond above said dam for the purpose of carrying said mill or mills;" and A. reserved to himself, his heirs and assigns, "the first and exclusive right to the use of sufficient water from said pond to carry a fulling-mill and three breast-wheels each twelve feet in diameter and fifteen feet in length, with the machinery and works that may be attached to or connected with the same." A., for himself, his heirs and assigns, covenanted that he would maintain and keep the mill-dam in good repair, and would erect and keep a flume in repair; and that he and his heirs and assigns "will not draw or use any of the water from the aforesaid mill-pond when there is not sufficient head of water in said pond to carry a fulling-mill and three breast-wheels as aforesaid." *Held*, on a bill in equity by a person claiming under B., to restrain a person claiming under A. from removing the breast-wheels and substituting therefor turbine wheels, that the indenture did not restrict A. and those claiming under him to the use of breast-wheels, but that the terms of the reservation, so far as they referred to breast-wheels, were intended to describe the quantity of water the use of which was reserved; and that the bill could not be maintained. *Coburn v. Middlesex Co.* 284.

See DAMAGES, 2; EVIDENCE, 6, 7, 8, 14; GRANT; TAX, 2.

## DELIVERY.

See GIFT, 1; MORTGAGE, 3.

## DEPOSITION.

The plaintiff filed interrogatories to a witness, whose deposition was to be taken on a commission. The defendant objected to each and every interrogatory for form and substance, and waived the filing of cross-interrogatories. The plaintiff then filed additional interrogatories, to which the defendant made the same objections, and also waived the filing of cross-interrogatories. The additional interrogatories were not answered. *Held*, that this fact did not entitle the defendant to have the deposition excluded. *Dole v. Wooldredge*, 161.

## DEVISE AND LEGACY.

1. A devise in a will of certain property of the testator to two persons named, "their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust, to sell, dispose of, invest, and manage the same, and appropriate such part of the principal and interest as they may deem best, for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid," cannot be upheld as a public charity, and is invalid. *Kent v. Dunham*, 216.
2. A testator, by his will, gave to his widow the use of his homestead and the income of \$10,000 during her life. He directed in the third clause that the residue of his estate should be divided into four equal parts; one part he gave for the benefit of his grandson W., the son of a deceased son; another fourth part he gave to his son G.; the other two parts he gave to trustees to pay the income to his two sons J. and F., in equal shares during their lives, and, on the death of either leaving children and a wife, the reversion was to go to such children and wife. The third clause then proceeded, "but if they leave no issue, then my will is that said reversion in both cases or either case shall go to all my grandchildren in equal shares, as hereinafter provided in reference to other portions of my estate." By the fourth clause, he directed that the reversion and remainder of the homestead and said \$10,000 should be divided into four equal parts; he gave one part for the benefit of his grandson W., upon the same terms named in the third clause; one part to his son G. absolutely; and the other two parts in trust for the use of his two sons J. and F., "on the same terms as hereinbefore provided, . . . and with the same disposition of the reversion and the remainder to their wives and children, if any children they should leave, and, if not, then equally to all my grandchildren that may be living." *Held*, on the death, unmarried, of J., who survived the widow, that his share of the funds provided for in both clauses of the will should be divided equally *per capita* among the grandchildren of the testator who were living at the death of J. *Morrill v. Phillips*, 240.
3. A testator, by his will, provided that, at the death of his widow, two funds should be set apart in trust from the personal property; made a specific devise of a parcel of real estate; gave the trustee power to sell the residue, "the proceeds of which is to pay the following legacies;"

and then gave three legacies of equal sums. There was a deficiency of the proceeds of the real estate, and a smaller deficiency of the personal property. *Held*, that the three legacies were specific legacies, and were not entitled to contribution from the personal property. *Boston Safe Deposit & Trust Co. v. Plummer*, 257.

4. A testator, by his will, gave his property in trust for the benefit of his widow during her life; and, after her death, \$25,000 of the personal property was to be set apart for the benefit of the testator's daughter during her life, and \$12,000 for the benefit of the testator's granddaughter during her life. At the death of the daughter, certain real estate, which was given to her for life, was given to a city in fee for charitable purposes, "and also \$20,000 added to it." At the death of the granddaughter, \$5000 of the \$12,000 set apart for her use was given to the city for certain charitable purposes, and "the other seven thousand dollars of this twelve" was given to the same city for similar purposes. At the time of the widow's death the personal property amounted to about \$32,000, and it was managed by the trustee as a single fund, and proportionate parts of the income were paid to the daughter and granddaughter. The daughter died, and the fund depreciated so that it was not sufficient to pay the \$12,000 directed to be set apart for the granddaughter's use and the legacy of \$20,000 to the city. *Held*, that the legacy to the city was a general legacy; that the fund directed to be set apart for the daughter became general assets of the estate upon her decease; and that the personal property existing at the daughter's death should be divided between the city and the granddaughter proportionally. *Id.*

See TRUST AND TRUSTEE, 1.

#### DIVORCE.

Connivance by a husband at an act of adultery, committed by his wife with one person, on the ground of which a libel for divorce filed by him is dismissed, is not an absolute bar to a libel for divorce for a prior act of adultery, committed by her with another person, and not known to the husband at the time he brought the former libel. *Morrison v. Morrison*, 361.

#### DOMICIL.

See INSOLVENT DEBTOR, 3; PROMISSORY NOTE, 4.

#### DRAIN.

See ACTION, 6.

#### EMINENT DOMAIN.

See ACTION, 2; CONSTITUTIONAL LAW, 4.

#### EQUITABLE DEFENCE.

See GUARDIAN AND WARD, 2; PROMISSORY NOTE, 5.

## EQUITY.

I. *Jurisdiction and General Principles.*

1. An assignment for value, without the consent of the debtor, of a part of a debt due under an existing contract between the debtor and the assignor, may be enforced by a bill in equity by the assignee against the debtor and the assignee in insolvency of the assignor, although the debtor is a municipal corporation, if the debtor in its answer admits that the debt is due, and asks that the rights of the different claimants of the fund be determined by the court. *James v. Newton*, 366.
2. The doctrine that a court of equity will not, by a decree for specific performance, compel a party to accept a title to land which is so doubtful that it may be exposed to litigation, does not apply when no question of fact is involved, and all parties in interest are before the court. *Chesman v. Cummings*, 65.
3. If A., a citizen of this Commonwealth, with knowledge that his debtor residing here has stopped payment, and anticipating that proceedings in insolvency will be begun against the debtor, makes an assignment of his claim to a citizen of another State, without consideration, and the latter, before proceedings in insolvency are begun against the debtor, brings an action upon the claim in said State, and attaches property of the debtor there, this court will, on a bill in equity, by the assignee in insolvency of the debtor, restrain A. from prosecuting the action to judgment, if A. has control of such action. *Cunningham v. Butler*, 47.
4. A bill in equity against A. and B. alleged that B., the owner of a mine, conspired with A. to call the price of the mine \$200,000, and, in pursuance of such conspiracy, A. and B. made certain representations to the plaintiff, whereby he and A. agreed to buy the mine at that price, organize a corporation to work the mine, and transfer the mine to the corporation, the stock to be distributed between the plaintiff and A. in proportion to their interests in the mine; that in fact B. was willing to sell the mine for \$100,000, and received only this amount, the plaintiff paying for his interest at the rate of \$200,000, and A. receiving the difference. *Held*, that the bill did not allege such a scheme to defraud the public as to prevent the plaintiff from maintaining the bill against A. *Dole v. Wool-dredge*, 161.
5. In 1870, A., the owner of land, mortgaged it to D., the condition of the mortgage being the payment of a certain sum of money, on demand, with interest semiannually, and to secure and save the mortgagee harmless for all indorsements, liabilities, expenses, and services, on account of the mortgagor. In 1878, A. mortgaged a portion of the same land to H., by a deed which referred to the mortgage to D. In 1880, D. assigned the first mortgage to S., the consideration expressed being \$1. On a bill in equity, brought, in 1884, by H. against S., to redeem the land from the first mortgage, it appeared that, in 1867, the firm of which A. was a member executed an assignment for the benefit of their creditors to S. and others, as trustees, by the terms of which certain property (in which that subsequently mortgaged by A. was not included) was to be sold, and the

proceeds, after deducting the disbursements, expenses, and charges of the trustees, were to be divided ratably among the creditors of the firm. S. was permitted to testify, against the objection of H., that, at the time of the execution of the first mortgage, it was to be held as security for the payment to S. for all the services he had rendered, or should thereafter render, to A. as trustee under the assignment of 1867, or as his attorney, and also for all advances and payments made or to be made, or liabilities incurred, by S. in behalf of A.; that D. did not make any advances to A., or incur any liability for him; and that these facts were all known to H. when he took the second mortgage. The judge found that this testimony was true, and ordered a decree to be entered that S. was entitled to hold the first mortgage as security for money paid out to the creditors of the firm of which A. was a member beyond what he had received from the assets of the firm, for money advanced to A., and for money paid one of his co-trustees for his services, with interest on these amounts; and that he was also entitled to hold it as security for money due him as trustee, or as attorney, without interest, no demand having been made; but that S. was not entitled to be indemnified against any claim of creditors of the firm, the judge having found that S. had fully executed the trust, although there was evidence that a creditor had recently made a demand upon him. *Held*, that the decree was right. *Taft v. Stoddard*, 545.

6. A. sent from a distant State to B., the husband of his sister C., in this Commonwealth, where A. formerly resided, a sum of money, which B. deposited in a savings bank, subject to the order of A. upon him therefor. C. bought a parcel of real estate here, and obtained from B., and used in part payment for the same, a portion of A.'s money which he had so entrusted to B. C. then wrote a letter to A., which informed him of such purchase, and contained the following language: "I could not make the purchase until I prevailed after a hard struggle with B. to let me have a little of your money, which he gave me on these terms, that the deed should be made out in my name, that at my death all should be yours; all B. wants is a living out of it whilst he lives, and if you don't approve of this letter, all the favor I ask of you is to give me one or two years, and I will pay you up your money with thanks, for so doing you will be the means of making me a home whilst myself and husband lives, and after that it is your property forever." A. received this letter, but did not answer it. C. lived in possession of the estate for nearly eight years, when she died, leaving a will, by which she devised the estate to B. for life, and, after his decease, to D., another brother, in fee, upon the conditions that he should pay the expenses of her last sickness and funeral, and should also pay to A. a certain sum larger in amount than that part of his money used as above stated. A. was, soon afterwards, informed of the contents of the will. B. went into possession of the estate, and held it until his death, twenty years after that of C. D., who had lent C. sums of money, and had also paid the expenses of her last illness and funeral, then took possession of the estate. D. knew, at the time of the transaction, that a part of A.'s money was used without his consent by C. in

paying for the estate. A., upon hearing of B.'s death, returned to this Commonwealth, and brought a bill in equity against D. for the conveyance of the legal title to the estate, having refused a tender by D. of the sum directed to be paid him in C.'s will. *Held*, that A., by his laches, had lost the right to assert any claim to the estate which he might have had otherwise; and that he was entitled only to the sum given him by the will of C., with interest from the time of B.'s death. *McGivney v. McGivney*, 156.

7. A bill in equity cannot be maintained to restrain a gas company from digging up, without the consent of the municipal authorities, the surface of the highway in front of the plaintiff's premises for the purpose of laying gas pipes, if the injury caused to the plaintiff is not of such a serious, permanent character that it cannot be adequately compensated in damages. *Kenney v. Consumers' Gas Co.* 417.
8. An attaching creditor of personal property, who, after a demand by a mortgagee of the amount due him upon his mortgage, which includes said property and other articles exempt by law from attachment, tenders the amount due the mortgagee, cannot maintain a bill in equity to compel the mortgagee to assign the mortgage to him. *Cochrane v. Rich*, 15.
9. If a suit in equity does not present a proper case for equitable interference, the court will not usually entertain it, although the defendant makes no objection to the jurisdiction of the court. *Kenney v. Consumers' Gas Co.* 417.
10. A bill in equity, brought by a corporation organized and doing business in Connecticut, against a corporation organized under the laws of that State, and its stockholders, alleged that the plaintiff was a creditor of the defendant corporation; that the defendant corporation had done business only in Massachusetts, and had no property which could be come at to be attached or taken on execution in an action at law; that the other defendants resided in Massachusetts; that in paying for their shares of stock, at the organization of the corporation, they paid partly in money, and partly in property at a valuation, which valuation was greatly in excess of the real value of the property, and this fact was known to them; and that under the laws of Connecticut, independently of any statutory or penal liability, a person subscribing for stock, or becoming a member of a corporation as an original shareholder, becomes liable to the corporation to pay for the shares the par value thereof, which liability is an asset of the corporation, forms a trust fund for the creditors, and may be enforced by any creditor of the corporation. The bill further alleged that the individual defendants were the organizers of the corporation, and its officers, and were guilty of a breach of trust in not requiring a full payment of the capital stock. The prayer of the bill was, that the value of the property paid in by the individual defendants be ascertained; and that they be ordered to pay to the corporation the amount of their respective deficiencies, so that the same could be paid to the plaintiff in satisfaction of his debt. *Held*, on demurrer, that the bill could not be maintained. *New Haven Horse Nail Co. v. Linden Spring Co.* 349.
11. A bill in equity, against A., B. his wife, and C., alleged that the plaintiff sold goods and lent money from time to time to A., who occupied a

store and gave the plaintiff to understand that he was doing business there on his own account under the name of A. and Company; that, on a day named, A. owed the plaintiff a certain sum, being the amount of an open account and of certain promissory notes; that afterwards all the goods in the store formerly occupied by A. were removed to another store, where they were attached on a writ in an action brought by the plaintiff against A. to recover the amount of said debt, and a keeper was placed therein; that, on the same day, B. brought an action against the plaintiff, and, at A.'s instigation, a keeper was placed in the plaintiff's store; that C. thereupon claimed to be the absolute owner of said stock of goods attached by the plaintiff, notified the officer who served the plaintiff's writ against A. to withdraw the keeper, and threatened suit if the plaintiff caused any goods to be removed from the store under his attachment, and the plaintiff then withdrew his keeper therefrom; that, at a date during the time of the sales and loans by the plaintiff to A., B. filed, by A.'s procurement, a certificate in the city clerk's office, stating that she proposed to do business on her separate account under the firm name of A. and Company, at the store then occupied by A.; that the plaintiff was not informed of the filing of such certificate until after he had brought suit against A.; that the plaintiff was ignorant as to the title under which C. claimed to own said goods, but the plaintiff was told by C., just before the attachment of the goods by the plaintiff, that the whole amount of C.'s claim against the goods did not exceed a certain sum; that the value of the goods above said sum was more than sufficient to satisfy the claim of the plaintiff, who had often been assured by A. that C. held ample security other than said goods for all, or nearly all, of any debt due by A. to C.; and that A. held a lease of certain real estate, which included the store so occupied by him, for a term of years, "which lease is unassignable by the lessee without the written consent of the lessor, and is terminable at the election of said lessor, if said lessee shall be declared insolvent, or any assignment of his property shall be made for the benefit of his creditors." The prayer of the bill was for an account, for an injunction, and for general relief. *Held*, on demurrer, that the bill could not be maintained. *Weil v. Raymond*, 206.

See ESTATES OF DECEASED PERSONS; INFORMATION; INSURANCE, 1;  
PARTNERSHIP; TRUST AND TRUSTEE, 1.

## II. *Pleading and Practice.*

12. Where the persons having similar interests in the subject matter of a suit in equity are numerous, it is within the discretion of the court to entertain the bill, although brought by one of such persons only, in behalf of himself and of all the others who may become parties thereto. *Libby v. Norris*, 246.
13. A bill in equity was brought in one county to have a sale of real estate by an executor declared void. Subsequently, the defendant in the first case brought a bill in equity, in another county, against the plaintiff in the first case, to confirm the same sale. The second bill did not refer to the first, and the answer to the second bill pleaded the pendency of the first



bill. The facts as they appeared from the bill and answer in the first case were not identical with the facts as they appeared from the bill and answer in the second case. *Held*, that, even if the second bill could be treated as a cross bill, the two cases could not be reserved together for the consideration of the full court upon the bills and answers. *Tansey v. McDonnell*, 220.

14. A bill in equity against A. was inserted in a writ dated April 20, 1882. Issue was joined on October 2, 1883. In December, 1883, A. had the case set down for a hearing upon the merits, and insisted upon a hearing unless certain attachments of real estate made upon the writ should be postponed to certain conveyances which he wished to make. An agreement to this effect was made, and the hearing was postponed. On February 21, 1884, the plaintiff filed an amended bill, joining B. with A. as a party defendant. This bill charged no new matter of substance against A. On September 23, 1884, A. filed an application that issues of fact be framed, and that the same be tried by a jury. Process was not served upon B., and he did not appear as a party. On September 25, 1884, A. filed an answer to the amended bill, which differed from his answer to the original bill only in demanding a jury trial. Issue was joined on the amended bill and answer on November 21, 1884. *Held*, that A., by setting down the case for a hearing in December, 1883, had waived a right to a trial by jury; and that the subsequent amendment did not avoid the effect of the waiver. *Held, also*, that the judge, to whom the application to have issues framed for the jury was made, did not, in the exercise of his judicial discretion, err in refusing to allow them to be framed. *Dole v. Wooldredge*, 161.

See EXCEPTIONS, 9.

#### ESTATES OF DECEASED PERSONS.

The heirs of E. brought, with the knowledge of the administrator of E.'s estate, a bill in equity against S. with alternative prayers for damages and for specific performance of an agreement to convey certain real estate. A decree was entered that S. should execute a deed of the same to the heirs within three months, on payment of a certain sum. On the same day, a decree was made by the Probate Court, on the petition of the administrator, licensing him to sell the real estate of E. The only real estate of E. was that which was the subject of the bill in equity. The heirs did not pay S. the amount named in the decree, but brought a bill of review to reverse the judgment rendered in the suit in equity, which bill was dismissed for want of prosecution. *Held*, that the interest of the estate of E. and of his heirs had determined; and that the decree of the Probate Court must be reversed. *Caverly v. Eastman*, 4.

See EXECUTOR AND ADMINISTRATOR; GIFT, 1; INFORMATION, 3.

#### ESTOPPEL.

1. The selectmen of a town, by a vote of the town, represented to the county commissioners that the boundary lines of a certain highway had been lost

or become uncertain, and prayed that the way be established and determined. The county commissioners, after due proceedings, adjudged that the highway was a certain number of rods wide, and indicated its limits. *Held*, that the town was not estopped by these proceedings from setting up, as against an abutter, a title in fee in the way. *Gaylord v. King*, 495.

2. If an owner of land, after conveying it in mortgage, leases it, and the mortgagee, after an entry for breach of condition of the mortgage, brings a writ of entry against the lessee to recover possession of the land, to which the lessee files a plea of *nul disseisin*, the lessee is not estopped by the lease to contest the demandant's title, if he has not attorned to him, or been compelled to pay rent to him. *Holmes v. Turner's Falls Co.* 590.

See GUARDIAN AND WARD, 2.

### EVIDENCE.

1. The plaintiff in an action testified that he received a letter, and sent it to a friend in another State, and that all that he knew about it afterwards was that his friend wrote that he had mislaid the letter and could not find it. The judge who presided at the trial then allowed the witness to testify to the contents of the letter. *Held*, that the defendant had no ground of exception. *Stevens v. Miles*, 571.
2. An instrument purporting to be a lease of a great pond, under the Pub. Sts. c. 91, § 12, is not admissible in evidence without proof of the genuineness of the signatures of the commissioners on inland fisheries attached thereto; and a certificate of the Secretary of the Commonwealth, attached to the instrument, certifying that the persons signing the same were at the time such commissioners, and that their signatures are genuine, is not the certificate contemplated by the Pub. Sts. c. 169, § 70, and does not render the instrument admissible in evidence. *Commonwealth v. Richardson*, 71.
3. The giving in evidence by one party of part of a conversation entitles the other party to introduce so much of the rest of it as relates to the same subject. *Dole v. Wooldredge*, 161.
4. In an action for the conversion of a promissory note, several months before its maturity, evidence of the financial condition of the maker of the note at its maturity is inadmissible upon the question of damages. *Kellogg v. Thompson*, 76.
5. In an action by an insurance company against its agent for failure to cancel a policy, as directed, the evidence tended to show that the defendant took no steps to effect such cancellation for five days after receiving directions to do so, when the insured property was burned. The defendant offered to testify that "orders generally from the companies are to cancel the policy as soon as convenient, and that it is generally understood that an agent has from five to ten days in which to cancel a policy." *Held*, that this evidence was rightly excluded. *Phoenix Ins. Co v. Frissell*, 513.
6. In an action for the conversion of the waters of a spring, it appeared that the plaintiff owned the right, reserved by the grantor in a deed of land, of "the spring of water on said premises;" and that a stream of water running on the land was the outlet of a spring a short distance off on the

adjoining land, and was finally lost in the ground. The plaintiff's evidence tended to show that there was no other spring; and he introduced the evidence of persons who had long lived in the vicinity of the stream and known of it, that it was called a spring. *Held*, that this evidence was admissible. *Peck v. Clark*, 436.

7. In an action for the conversion of the waters of a spring, it appeared that the plaintiff owned the right, reserved by the grantor in a deed of land, of "the spring of water on said premises;" and that a stream of water running on the land was the outlet of a spring a short distance off on the adjoining land, and was finally lost in the ground. The grantee of the land testified for the plaintiff that there was no other water or spring on the land at the time he purchased it, or during his ownership, than this little stream of water; and that he understood, at the time he purchased, that this stream was the water reserved in the deed to him. *Held*, that the defendant had no ground of exception to the admission of this evidence. *Ib.*
8. At the trial of a petition for the assessment of damages occasioned to land of the petitioner's intestate by the discontinuance of a street, it appeared that the intestate acquired title to the land under a deed from the petitioner. The petitioner was asked, on cross-examination, if, at any subsequent time before the death of his intestate, he owned said land, or had received a deed of it from any person; to which he answered in the negative. He was then asked if he did not, after the execution of the deed by him to his intestate, and about the year 1880, give a deed of said land to one R., and in said deed covenant that he was the sole owner thereof; to which he replied that he did not give such a deed, and that, if he did, it was a mistake. The respondent, for the purpose of contradicting the petitioner's testimony, then offered in evidence the record of a deed of said land from the petitioner to R., given in 1880, and covenanting that the grantor was the sole owner in fee of the land. No objection was made that the original deed was not produced. *Held*, that the evidence offered was properly excluded. *Webster v. Lowell*, 324.
9. In an action for the price of a quantity of sand sold by the plaintiff to the defendant, it appeared that the only account which was kept of the sand was kept by the plaintiff by making straight marks in a blank book, from reports made to him by his men who drove his teams; and that the plaintiff could not read or write, and could not tell how many loads were drawn, of his own knowledge, except by counting the marks in said book. The defendant offered to prove how much sand was actually delivered by the plaintiff, by showing how many casks of lime were used by the defendant, and how much sand was used with each cask in performing the work done by the defendant with the plaintiff's sand, by actual count by the men who made the mortar and mixed the lime with the sand drawn by the plaintiff. He also offered to show by experts how much sand is used with a cask of lime in making such mortar as the defendant used with sand furnished by the plaintiff, no actual count being made or kept by the defendant otherwise. The evidence offered was excluded. *Held*, that the evidence first offered should have been admitted; and that, if the sand was

- all used in making mortar, and if the mortar was all of the same or a similar quality, and the witnesses had examined the mortar, the evidence of the experts offered was admissible, provided they could testify that the quantity of sand could be determined in this manner. *Miller v. Shay*, 598.
10. In an action against the maker of a non-negotiable promissory note, by a bank which had discounted the note for the payees, the defence was failure of consideration owing to the neglect of the payees to send to the maker certain goods. The plaintiff offered to show that the money obtained by the discount of the note was applied by a special partner of the payees to the payment of another note of the same maker, and payable to a firm composed of said special partner and one of the payees of the note in suit. *Held*, that the evidence was rightly excluded. *Shoe & Leather Bank v. Wood*, 563.
  11. At the trial of a man for incest, it appeared that the girl with whom the offence was alleged to have been committed was thirteen years old. Medical experts, who examined the girl six weeks after the time of the alleged offence, were permitted to testify to the abnormal condition of the girl's private parts at the time they examined her, and to the causes which would produce such condition. *Held*, that the defendant showed no ground of exception. *Commonwealth v. Lynes*, 577.
  12. At the trial of an action for the conversion of a promissory note payable to A., signed by B. and pledged to the plaintiff, another note, signed by A. and delivered to the defendant, containing the words "collateral in B.'s note," was put in evidence by the plaintiff, who was then allowed to show, by the testimony of A., that, in a loan of a certain sum by the defendant to A., which that note represented, nothing was said about the note in suit, and that A. did not know that it was mentioned as collateral in any note he had given to the defendant; and the judge ruled that it "could not be received to affect the right of either party under the note and contract" admitted in evidence. *Held*, that the defendant had no ground of exception. *Kellogg v. Thompson*, 76.
  13. In an action for the use and occupation of certain premises described in a written lease, it appeared that the defendant had not signed the lease; and that the instrument was sent to him, and his son received it and placed it in the defendant's desk. The plaintiff called the son as a witness, who testified that he showed the lease to the defendant for his signature; that the defendant took it and read it, but did not sign it. The defendant asked the witness, on cross-examination, what the defendant said to him when he had read the instrument "about accepting, or signing, or executing, or refusing to accept, or sign, or execute, the same." *Held*, that the question was admissible as part of the *res gestæ*. *Stevens v. Miles*, 571.
  14. In an action for the conversion of the waters of a spring, it appeared that the plaintiff owned the right, reserved by the grantor in a deed of land, of "the spring of water on said premises;" and that a stream of water running on the land was the outlet of a spring a short distance off on the adjoining land, and was finally lost in the ground. The plaintiff offered in evidence the declarations of his deceased grantor, made on the land when he conveyed to the plaintiff, that he intended to carry this stream of

water off the land, and that he called it a spring. *Held*, that this evidence was inadmissible. *Peck v. Clark*, 436.

15. At the trial of a complaint for unlawfully selling intoxicating liquors to a minor, the person to whom the sale was made may testify that he was twenty years and eight months old at the time of the sale. *Commonwealth v. Stevenson*, 466.

See ADVERSE POSSESSION; ASSAULT; BASTARD; CONTRACT, 1, 2; DEPOSITION; EXCEPTIONS, 9, 11; FALSE IMPRISONMENT; FOREIGN LAW; FRAUDS, STATUTE OF, 1; GUARANTY, 2; INTOXICATING LIQUORS, 9-12; LIMITATIONS, STATUTE OF, 1; MASTER AND SERVANT, 4; NEGLIGENCE, 3; PROMISSORY NOTE, 5; REPLEVIN, 2; SHIP, 2; WAY, 3, 12.

### EXCEPTIONS.

1. No exception lies to the refusal to give an instruction in the language requested, if it is given in substance. *Stanchfield v. Newton*, 110.
2. A party to an action is not entitled to have a request for a ruling granted, which fails to state any proposition of law, but asks for a ruling upon certain facts which the jury may find. *Kellogg v. Thompson*, 76.
3. If the testimony of a witness is contradicted, no exception lies to the refusal of the judge to instruct the jury what their verdict should be if they should believe the testimony of the witness to be true. *Stanchfield v. Newton*, 110.
4. If some of the evidence at the trial of an action is conflicting, one party is not entitled to a ruling that, upon the undisputed facts of the case, the jury must find for him, unless the disputed facts were immaterial to the issue. *Kellogg v. Thompson*, 76.
5. If a ruling requested is properly refused, and the judge gives a ruling on the same subject matter which is erroneous, and the party requesting the ruling excepts both to the refusal to rule as requested and to the ruling given, he is not precluded from availing himself of the latter exception. *Holmes v. Turner's Falls Co.* 590.
6. A bill of exceptions stated that, after the charge had been delivered to the jury, the plaintiff excepted to certain portions of the charge, and set forth detached sentences of the charge as those excepted to, and did not give the context. *Held*, that the exceptions could not be sustained, unless it appeared that there was some substantial error which misled the jury. *Rock v. Indian Orchard Mills*, 522.
7. In an action for personal injuries sustained while in the defendant's employ, the plaintiff's bill of exceptions set forth detached sentences of the judge's charge to which he excepted, one of which was that the question was whether the accident was caused by any act of the defendant, or was the result of want of due care on the part of the plaintiff. *Held*, that the plaintiff had no ground of exception. *Id.*
8. At the trial of an action for the conversion of the waters of a spring, by means of an aqueduct, if the ruling of the judge requires the jury to find that the defendant put in the aqueduct and withdrew the water without the plaintiff's consent, the defendant is not entitled, after the charge to

- the jury is finished, to single out particular circumstances tending to show consent, and require the judge to comment on them specially. *Peck v. Clark*, 436.
9. At the hearing of a suit in equity against A. and B. for conspiring to defraud the plaintiff, no exception lies to the admission in evidence, in behalf of the plaintiff, of declarations of B. relating to the conspiracy, if there is then evidence in the case of the existence of the conspiracy, and the plaintiff offers to produce further evidence, although B. has not been served with process, and has not appeared as a party defendant. *Dole v. Wooldredge*, 161.
  10. Judgment by agreement was entered against an attaching officer in an action brought against him for the conversion of the attached property. He then brought an action upon a bond of indemnity given to him by the plaintiff in the writ on which the attachment was made. It was not contended that the judgment by agreement was collusive or fraudulent, either as affecting the parties to it, or others collaterally affected by it; and it was not contended that the officer could have successfully defended the action in which the judgment was entered. *Held*, that this was, in effect, an admission that there was no defence to that action; and that such an admission rendered immaterial the question whether there was sufficient evidence to show that a person who claimed to be acting as the attorney of the principal on the bond, who directed the officer to make the attachment, and who also instructed him to pay the execution issued on the judgment, had any authority to act for such principal. *Lindsey v. Parker*, 582.
  11. In an action, by the assignee in insolvency of the estate of A., to recover the amount of certain promissory notes alleged to have been transferred by A. to the defendant, in violation of the provisions of the insolvent law, the plaintiff introduced evidence tending to show that A. was at one time connected in business with D.; that the firm failed, and compromised with its creditors, of whom the defendant was one, by paying forty cents on the dollar; that A. began business again, and continued it for some time, when he sold out for a certain sum, the notes given for the greater part of which were transferred to the defendant, to whom he was largely indebted; and that A. was insolvent from the time of the failure of the firm of A. and D. until the date of the insolvency proceedings against him. The defendant called a witness, who testified that he was in the defendant's employ, and had charge of his accounts; and that, at about the time that A. and D. failed, he went to their place of business to look after their debt to the defendant. The defendant then asked him, "Do you know whether there was any difficulty between D. and A. about that time that led to the failure?" *Held*, that the judge was justified, in his discretion, in excluding the question. *Abbott v. Shepard*, 17.
- See ACCOMPLICE; ACTION, 6; ASSAULT; BASTARD; EVIDENCE, 1, 7, 11, 12; FALSE PRETENCES, 4; INCEST; INSOLVENT DEBTOR, 4; INTOXICATING LIQUORS, 3, 8; MASTER AND SERVANT, 2, 5, 6; MILL, 1; MORTGAGE, 3; NEGLIGENCE, 1, 2, 4; REPLEVIN, 2; WAY, 1, 2, 6, 8; WITNESS; WRIT.

## EXECUTOR AND ADMINISTRATOR.

The settlement in the Probate Court of an administrator's account, showing that he has exhausted all the estate of his intestate in paying the expenses of the last sickness, funeral, and administration, is a good defence to an action brought against the administrator, upon his bond, although the administrator has suffered a judgment to be recovered against him before such settlement of his account. *Fuller v. Connelly*, 227.

See ESTATES OF DECEASED PERSONS; INFORMATION, 3.

## EXPERT.

See EVIDENCE, 9, 11.

## FALSE IMPRISONMENT.

In an action for an illegal arrest, made by authority of a certificate issued by a magistrate upon the affidavit of the clerk of the defendant's attorney, evidence is admissible, on the issue of the authority of the clerk to act in the matter, of the presence and conduct of the defendant at the hearing, after the arrest, upon the application of the plaintiff to take the oath for the relief of poor debtors, although such hearing was subsequent to the date of the writ in the action for the illegal arrest. *Shattuck v. Bill*, 56.

See ATTORNEY AND COUNSEL; POOR DEBTOR, 1.

## FALSE PRETENCES.

1. An indictment for obtaining money by false pretences alleged that the defendant, at a time and place named, falsely represented to A. that the defendant was treasurer and secretary of a corporation established in another State; that the capital stock of the corporation was \$400,000; that \$200,000 worth of said stock had been subscribed for and paid in in cash, which was chiefly invested in real estate where the corporation was located; that the stock was worth, and was selling for, a certain sum per share, at said place; and that the defendant, on a later day named, by a letter written by him and received by A. on said day, falsely represented that the amount of capital stock subscribed for, paid in, and invested as aforesaid was \$192,000, instead of \$200,000, as previously stated by the defendant. At the trial, the government introduced evidence tending to prove the oral statements alleged to have been made by the defendant; and, to prove the modification of these statements alleged to have been made subsequently by letter, introduced a letter written by the defendant to A., the material part of which was as follows: "The issue of additional stock in the" corporation "will not be made till" a day named, "as we want to dispose of about \$8000 more stock; we have sold \$192,000 and want to make it \$200,000, then one half of the capital stock will have been issued. About two thirds of this stock has been taken by old stockholders at par, but part of the stock has sold as high as" a certain sum "per share. The new

stock does not receive any dividend until" a day named. The judge refused to rule, as requested by the defendant, that there was no evidence to prove the representation as alleged in the indictment, or that there was a variance between the allegation and the proof as to the letter; and instructed the jury, that, if they should find that the statement in the letter was a correction of the oral statement previously made as to the amount of stock issued, then stated to be \$200,000, they would be authorized to convict the defendant, and that the meaning of the letter was for them, but, if it related to a new issue of stock, they must acquit. *Held*, that the defendant had no ground of exception. *Commonwealth v. Wood*, 459.

2. Under an indictment for obtaining money by false pretences, a conviction may be had for falsely representing that the stock of a corporation was selling at a certain price, but not for falsely representing that it was worth a certain price. *Ib.*
3. An indictment alleging that, by reason of false representations made by the defendant to A., as to the stock of a corporation, A. was induced to deliver to the defendant, at a certain town in this Commonwealth, a cashier's draft for the payment of a sum named, is supported by proof that A. sent the draft to the defendant in another State, being directed so to do by a note written by the defendant and left at A.'s place of business in this Commonwealth, whether A. sent the draft from this Commonwealth by the hand of an agent of the defendant, or deposited it in the mail. *Ib.*
4. An indictment alleged that A., induced by certain false pretences made by the defendant, (which were set forth,) delivered to the defendant a certain sum of money, in exchange and in payment for a certain number of shares of stock. A bill of exceptions, alleged by the defendant and allowed by the presiding judge, which purported to set out all the evidence material to the questions raised, stated that there was evidence tending to show that A. was induced to send a check, "a copy of which is inserted in said indictment," to the defendant. No copy of a check was inserted in the indictment. *Held*, that a ruling, requested by the defendant, that the evidence would not warrant a conviction, should have been given. *Ib.*

#### FISHING.

1. At the trial of a complaint on the Pub. Sts. c. 91, § 27, for illegally fishing in a great pond, the defendant is not entitled to a ruling that fishing for any other fish than those which were the only useful fish alleged to be cultivated in the pond would be no offence. *Commonwealth v. Richardson*, 71.
2. A person who paddles a boat, in which another is fishing in violation of the Pub. Sts. c. 91, § 27, may be convicted of illegally fishing, within that statute, as a participant in the offence. *Ib.*

See COMPLAINT, 1; EVIDENCE, 2; TOWN.

#### FLOWING LAND.

See MILL.



## FORCIBLE ENTRY AND DETAINER.

See BOND, 2.

## FOREIGN LAW.

Where the evidence of a foreign law consists entirely of a statute, the question of its construction and effect is for the court. *Shoe & Leather Bank v. Wood*, 563.

See ACTION, 3.

## FRAUD.

See CONTRACT, 1; EQUITY, 4; EXCEPTIONS, 9; FRAUDS, STATUTE OF, 1; INSOLVENT DEBTOR, 1; SCIRE FACIAS; TROVER, 2.

## FRAUDS, STATUTE OF.

1. In an action against A. and B. for the conversion of certain goods, evidence is inadmissible, under the Pub. Sta. c. 78, § 4, of oral representations or assurances made by B., in regard to the credit and pecuniary responsibility of A., that A. might obtain credit of the plaintiff, for the purpose of showing that the plaintiff was fraudulently induced to sell the goods in question to A. *Bates v. Youngerman*, 120.
2. A. directed his agent to look for a store for him, and to negotiate for a lease of it. The agent wrote a letter to A., stating that he had been looking at B.'s store, containing a description of the premises, naming the annual rent asked for a term of five years, and inquiring whether the premises and amount of rent were satisfactory. A. telegraphed to the agent as follows: "If basement included at four thousand secure five years' lease." This telegram was handed by the agent to B., who verbally accepted the offer. Held, that there was not a sufficient memorandum in writing of a contract to accept a lease within the statute of frauds, to enable B. to maintain an action against A. *Hastings v. Weber*, 232.

See GUARANTY, 1.

## FRAUDULENT CONVEYANCE.

See EQUITY, 11.

## FRAUDULENT REPRESENTATION.

See FALSE PRETENCES; FRAUDS, STATUTE OF, 1; TROVER, 2.

## GIFT.

1. A. deposited several sums of money in a savings bank, "in trust" for certain relatives of his, and told each that he had done so, saying that he could control the money while he lived, but that it was theirs after his death. He gave the deposit-books into the possession of one of these

persons, who had charge of A.'s books and papers; and A. drew the interest accruing on the several deposits. About a year before his death, A. said that he should not make a will; that he had provided for these relatives by depositing money in the savings bank. The night before he died, A. said to these persons, "When I am gone, you take these books and transfer the money to your own names, and say nothing to nobody about it." *Held*, that there was not a perfected gift of the money to said persons; and that the administrator of A.'s estate was entitled to it. *Nutt v. Morse*, 1.

2. A corporation was authorized by will to lend money from the income of a fund, to the amount of \$500, for a term not over five years, to each of certain apprentices, on his furnishing security for the repayment of the same, at the expiration of the term, with interest annually. The will further provided, that, if the interest were paid punctually, and in a certain other event, the obligation should be cancelled. The corporation deposited the sum of \$500 in a savings bank in the name of an apprentice, but payable to the corporation, as collateral security for the promissory note of the apprentice, by which he promised to pay the corporation \$500 in five years from date, or on demand, at the option of the trustees of the corporation, with interest annually. Three days before the five years from the date of the note expired, the trustees "voted to surrender" the note of the apprentice. On the same day, and before anything further had been done, an action was brought against the apprentice by a third person, and the savings bank and the corporation were summoned as trustees. *Held*, that they were entitled to be discharged. *Hayden v. Hayden*, 448.

See MORTGAGE, 1, 4.

#### GOODS SOLD AND DELIVERED.

See ACTION, 4; AUDITOR; CONTRACT, 2; EQUITY, 11; EVIDENCE, 9.

#### GRANT.

1. In 1787, a town appointed a committee to dispose of the highways in the town, or any part thereof. In 1788, the committee reported that they had laid out the old ways of a certain width, and had measured out and bounded the several pieces of land at the front, rear, or sides of each man's lot bounded on the said new surveyed ways, which pieces of land the town would sell to the respective owners of the lots. The town voted to accept the report of the committee; that the tracts of land described "be and hereby are granted in fee to" the persons named; and that, whenever payment should be made, "the town way in each tract respectively should be discontinued." *Held*, that the grant did not pass the fee to the centre of the ways as newly laid out. *Gaylord v. King*, 495.
2. The owner of land bordering upon a highway, the fee of which was in the town, petitioned the town to allow him to straighten his fence by extending it a few feet into the highway. A committee appointed by the town reported that the land prayed for would not encroach upon the county way or injure the street, and recommended the town to grant a

parcel of land, according to a plan. The town voted to allow the petitioner to enclose a strip of town land in front of his land, on payment of a certain sum, as described in the report of the committee. *Held*, that the grant did not pass the fee to the centre of the way. *Gaylord v. King*, 495.

#### GUARANTY.

1. A negotiable promissory note of a corporation, signed in its name by P., treasurer, and payable to the order of P., was indorsed by the payee for the accommodation of the maker. On the back of the note was the following, signed by the defendants: "We hereby guarantee the payment of the within note." *Held*, that the defendants' contract was not with the payee, but with the first holder for value. *Held, also*, that the guaranty was not within the statute of frauds. *Jones v. Dow*, 130.
2. The declaration in an action alleged that a corporation, by its treasurer, P., made a promissory note for \$5000, payable to P., for the purpose of negotiating it for the benefit of the corporation; that P. indorsed the note, which was approved by the directors of the corporation; that the defendants, who were directors, "for said purposes and for said considerations," indorsed upon the note the following contract: "We hereby guarantee the payment of the within note;" and that the note was then, before its maturity, sold and delivered to the plaintiff for a valuable consideration paid by him to P. At the trial, the plaintiff testified that P. asked him to discount the note; that he had the transaction with him as treasurer; that P. said the money was going to the corporation; that he let P. have \$1000, and took his individual note for the amount, with the note for \$5000 and a bill of sale of a lot of railroad ties as collateral security, with a power of sale on default of payment within five days; that he afterwards made two similar loans of \$250 each, taking P.'s individual note for each with the same security; that these loans were not paid when due; and that payment was demanded. *Held*, that sufficient consideration had been shown to support the action on the guaranty; that there was no variance between the declaration and the proof; and that the testimony of the plaintiff was admissible for the purpose of identifying the plaintiff as the first holder for value and the promisee in the guaranty, and also to show the consideration. *Id.*

#### GUARDIAN AND WARD.

1. If a guardian's sale under a license of the Probate Court is void on account of a defective notice, it may be confirmed by a proceeding in equity under the Pub. Sts. c. 142, § 22, although made before the passage of the St. of 1878, c. 253, § 3, of which § 22 of the Pub. Sts. c. 142, is a reenactment. *Nott v. Sampson Manuf. Co.* 479.
2. In 1863, a ward's interest in land was sold by his guardian under a license from the Probate Court, of which proper notice was not given. The sale was conducted in good faith. All the other interests in the land were sold at the same time, and the land brought its full value. Expensive improvements were subsequently made upon the land by the purchasers, without

knowledge of any defect in the title. The guardian charged himself with the proceeds of the sale in his account, and was charged by the court. Suit was brought on his bond by a subsequently appointed guardian, which was prosecuted by the ward after he became of age in 1882. *Held*, that these facts constituted an equitable defence, under the St. of 1883, c. 223, § 14, to a writ of entry, brought by the ward in 1885, to recover his interest in the land. *Nott v. Sampson Manuf. Co.* 479.

See ASSIGNMENT, 2.

#### HEIR.

See BENEFICIARY ASSOCIATION.

#### HORSE RAILROAD.

See NEGLIGENCE, 2-4.

#### HUSBAND AND WIFE.

See EQUITY, 11; INTOXICATING LIQUORS, 1.

#### INCEST.

At the trial of an indictment for incest, the judge instructed the jury that carnal knowledge and penetration were necessary to be proved to convict the defendant. *Held*, that the defendant was not entitled to have the jury further instructed, that, if they could not find, on the testimony of the girl with whom the offence was alleged to have been committed, that the defendant had actual sexual intercourse with her, by penetration, they should acquit. *Commonwealth v. Lynes*, 577.

See EVIDENCE, 11.

#### INDICTMENT.

See CONVICTION; FALSE PRETENCES.

#### INFANT.

See EVIDENCE, 15; INTOXICATING LIQUORS, 7; NEGLIGENCE, 2-4.

#### INFORMATION.

1. An information cannot be maintained, in the name of the Attorney General, at the relation of a private individual, to restrain a corporation from digging up the surface of the highway in front of his premises for the purpose of laying gas pipes, in the absence of evidence that a real and substantial injury exists or is threatened, and that the municipal authorities have refused relief, upon application to them, under the Pub. Sts. c. 106, § 77. *Attorney General v. Consumers' Gas Co.* 417.

2. An information, in the name of the Attorney General, which is not brought *ex officio*, but at the relation of an individual, for the protection of his private interests against the acts of a corporation, cannot be maintained for the purpose of restraining the corporation from the further use of its corporate powers, and from usurping public franchises to which it is not entitled. *Attorney General v. Consumers' Gas Co.* 417.
3. Money was contributed for the erection of a soldiers' monument in a town, and a committee was appointed to have charge of the fund, and to erect a monument when the fund should be sufficient therefor. B., who was the treasurer of the committee, deposited the money in a savings bank in his name as "treasurer of monument association." Afterwards he drew from the bank a part of the sum deposited, and appropriated it to his own use. He died subsequently; his will was duly proved, and an executor thereof appointed, who gave bond and due notice of his appointment. Upon B.'s death, C. was appointed treasurer of the committee; and, more than two years after B.'s executor gave bond, C. demanded of him payment of the sum misappropriated, which demand was refused. *Held*, on an information in equity by the Attorney General, at the relation of the committee, that, if the funds could be considered as given to a public charity, the proceeding, so far as it concerned the amount appropriated by B., was barred as to B.'s executor by the Pub. Sts. c. 136, § 9, limiting suits against executors to two years after the time of giving bond; and that it could not be maintained against the heirs at law of B., or the town. *Held, also*, that, as all parties agreed, the plaintiff might take a decree that the fund in the bank be paid to the committee or to C., to be held for the purposes for which the money was contributed. *Attorney General v. Brigham*, 248.

#### INSOLVENT DEBTOR.

1. A., who was erecting a building under a contract in writing with B., became insolvent, and a majority of his creditors voted to accept his offer to pay a certain sum on the dollar in full settlement of their claims. C., with full knowledge of these facts, lent him a sum of money to enable him to complete his contract with B. and to fulfil his agreement of compromise with his creditors, and took from him an assignment, under seal, of an equivalent sum due under the contract. A. expended most of the money received from C. for the purpose for which it was borrowed. By reason of the refusal of certain creditors to accept the amount offered, A. filed a petition in insolvency, five days after the assignment was executed, and an assignee of his estate was appointed. *Held*, that the assignment by A. to C. was not made in fraud of the insolvent law. *James v. Newton*, 366.
2. An insolvent, shortly before the beginning of insolvency proceedings, conveyed chattels to another, in consideration of the grantee agreeing to pay certain mortgages upon the property; and afterwards the grantee, being then in possession of the property, obtained an assignment of one of the mortgages, and an indorsement of the note, then overdue. *Held*, that

the assignee in insolvency of the grantor could maintain an action, under the Pub. Sts. c. 157, § 98, against the grantee, to recover the value of the property so conveyed, less the amount due on the mortgage. *Wells v. White*, 518.

3. An assignment of property, executed in another State, by a debtor domiciled there, for the benefit of his creditors, which is valid by the law of that State, but is invalid by the law of this Commonwealth, because not executed or assented to by the creditors, will not be upheld in this Commonwealth, as against attaching creditors of the assignor constituting a partnership, although some of such creditors are domiciled in the State where the assignment was executed, and where the firm has a place of business, and some in another State, the others being domiciled and the firm having its usual place of business here. *Faulkner v. Hyman*, 53.
4. In an action, by the assignee in insolvency of the estate of A., to recover the amount of certain promissory notes, alleged to have been transferred by A. to the defendant, in violation of the provisions of the insolvent law, it appeared that, about two months before the proceedings in insolvency were begun, A. sold his business to a third person, and, of the amount received therefor, transferred the greater part to the defendant, to whom A. was largely indebted. The plaintiff introduced evidence tending to show that A. had been connected in business with D.; that this firm failed in the previous year, and compromised with its creditors, including the defendant, for forty cents on the dollar; that A. began business again, and continued it until he sold out as above stated; that the defendant examined into the assets and liabilities of A. soon after he so started in business again, and ascertained his condition; and that A. was insolvent from the time of the failure of the firm of A. and D. until the proceedings in insolvency were begun against him. The defendant introduced evidence tending to show that A. was solvent when he began business again, and at the time of said transfer to the defendant; and that he had no reason to believe that A. was insolvent. The judge instructed the jury that the plaintiff must prove three things: first, that, at the time of the payment or transfer in question, A. was insolvent, or in contemplation of insolvency; secondly, that the payment or transfer in question was made with a view to give a preference to the defendant over other creditors; thirdly, that, at the time of the payment or transfer in question, the defendant had reasonable cause to believe that A. was then insolvent, or in contemplation of insolvency; and that, if those three propositions were established, then the verdict must be for the plaintiff. The defendant then requested the judge to instruct the jury that the plaintiff must also satisfy them that the defendant had reasonable cause to believe that the transfer of the notes was made in fraud of the laws relating to insolvency. This instruction the judge gave, but with the further instruction, that, if they found affirmatively established the three propositions before stated, that would authorize the finding that the transfer was in fraud of the insolvent law. *Held*, that the defendant had no ground of exception. *Abbott v. Shepard*, 17.

See EQUITY, 1, 3; EXCEPTIONS, 11.

## INSURANCE.

1. A mutual fire insurance company was incorporated in 1848, subject to the provisions of the Rev. Sts. c. 37. In 1854, it was authorized, on receiving from the subscribers thereto a guaranty capital of a certain amount, to make insurance "otherwise than on the mutual principle," and was made subject to the Rev. Sts. c. 37, and all subsequent acts relating to insurance companies. To induce persons to subscribe to the guaranty capital, it adopted certain by-laws, by which the directors were authorized, before obtaining subscriptions, to determine the rate of the semiannual dividend, which rate should not be liable to be reduced without the written consent of each shareholder. The directors accordingly fixed such rate. The by-laws also provided that the funds of the company arising from premiums or assessments should be appropriated in a way which treated the mutual and stock departments as one. The St. of 1856, c. 252, § 36, provided that all business done by mutual insurance companies, on account of each department, should be kept separate. From 1854, the insurance company in question kept distinct and separate accounts of the business of the two departments. In 1882, the company, having a large surplus accumulated from the earnings of the stock department, voted to discontinue this department, and to redeem its guaranty capital. *Held*, on a bill in equity, under the Pub. Sts. c. 119, § 94, brought for this purpose by the company against the shareholders of the guaranty capital, that the by-laws were contrary to the provisions of the Rev. Sts. c. 37, and were void; that the company had acted rightly in keeping separate the accounts of the two departments; and that the shareholders of the guaranty capital were entitled to the surplus belonging to the stock department. *Traders & Mechanics' Ins. Co. v. Brown*, 403.
2. A policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 139, against loss by fire upon certain premises, was issued to A., payable in case of loss to B., mortgagee, and providing that the insurer, within sixty days after statement or proof of loss, should either pay the amount of its liability or replace the property. After the policy was issued, A. conveyed the premises to C. A loss occurred, and within a month afterwards B. delivered to the insurer a proof of loss, signed and sworn to by C.; and, more than sixty days before bringing suit, B. delivered to the insurer another proof of loss, signed and sworn to by A. The insurer received and retained both of these proofs without objection, and, though twice asked in writing to inform B. if it required or wished for any further statement, made no reply. *Held*, in an action upon the policy, that the insurer had waived any defects in the proofs of loss, if any existed. *Eliot Savings Bank v. Commercial Assurance Co.* 142.
3. If a policy of insurance is issued to "A., payable in case of loss to B., mortgagee," and is in the form prescribed by the Pub. Sts. c. 119, § 139, containing the provision that, "if this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee, or his agents or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate,"

a conveyance of the insured property by A. to C., without the assent of the insurer, although it may avoid the policy as to them, will not affect B.'s right to recover, after a loss. *Eliot Savings Bank v. Commercial Assurance Co.* 142.

4. A policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 139, against loss by fire upon certain premises, was issued to "A., payable in case of loss to B., mortgagee," and providing that the insurer, within sixty days after proof of loss, should either pay the amount of its liability or replace the property, or might, within fifteen days after such statement, notify the insured of its intention to rebuild or repair the premises. A loss occurred, and, nine days afterwards, and after an agent of the insurer had examined the premises and appraised the loss, B., at the request of A., who was unable to do so, began to repair the premises. Immediate repairs were necessary in order to prevent further damage. The repairs were duly finished, and were reasonable and proper for the protection of the property. The insurer never notified the insured of an intention to repair. *Held*, in an action by B. upon the policy, that his acts in making repairs did not defeat his right to recover. *Ib.*
5. A policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 139, against loss by fire upon certain premises, issued to "A., payable in case of loss to B., mortgagee," provided that the insurer might elect, when it was not liable to the mortgagor or owner, either to pay to the mortgagee the loss, or to pay the full amount secured by the mortgage, and to receive an assignment of the mortgage and debt. A loss occurred, and B., at the request of A., who was unable to do so, made repairs upon the premises which were necessary for the protection of the property. The insurer denied its liability for the loss; and B. brought an action upon the policy. The insurer filed an answer, denying any liability on its part; and, seven months after the action was brought, made a tender to B. of the amount of the mortgage, principal and interest, and requested an assignment of the mortgage and note, which B. declined to make. *Held*, that the tender was not made within a reasonable time, and was not sufficient in amount. *Ib.*

See ACTION, 1; EVIDENCE, 5; PRINCIPAL AND AGENT, 2.

## INTEREST.

See PARTNERSHIP; TRUST AND TRUSTEE, 4, 6.

## INTOXICATING LIQUORS.

1. A notice in writing, signed by the wife of a person having the habit of drinking intoxicating liquors to excess, to a seller of such liquors, as follows, "My husband has been in the habit of getting liquor here and coming home drunk, . . . I don't want you to give him any more drink," is a sufficient compliance with the Pub. Sts. c. 100, § 25. *Kennedy v. Saunders*, 9.
2. In an action, under the Pub. Sts. c. 100, § 25, upon a declaration containing four counts, two of which allege the sale or delivery, at different times, of



intoxicating liquors to a person having the habit of drinking such liquors to excess, within twelve months after having been notified not to make such sale or delivery, and the other two counts of which allege the permitting a loitering of such person upon the premises where the liquors are kept, at different times within said twelve months, the plaintiff may recover separate damages under each count. *Kennedy v. Saunders*, 9.

3. A complaint alleged that the defendant, at a time and place named, sold intoxicating liquor "without any authority therefor." At the trial, a witness for the government testified that he knew where the defendant kept a place, and that he saw a sale of liquor there after eleven o'clock in the evening of the day in question, but that he could not identify the defendant. It was admitted that the defendant was the proprietor of the place where the sale was made, and had a license of the first class, under the Pub. Sts. c. 100, to do business thereat. The government rested its case; and the defendant asked the judge to rule that there was no evidence upon which the jury could find the defendant guilty. The judge refused so to rule, and ruled that there was such evidence. The defendant then introduced evidence tending to show that no sale was made after eleven o'clock. There was evidence tending to show that the defendant kept a public bar; and that the sale testified to was made over said bar. The defendant repeated his previous request for a ruling, which was again refused; and the judge instructed the jury that the alleged sale must have been made by the defendant, or under his sanction or authority, and that, if so made after eleven o'clock at night, or if so made over a public bar before that hour, they might find the defendant guilty. *Held*, that the defendant had no ground of exception. *Commonwealth v. Chadwick*, 595.
4. If a license is granted for the sale of intoxicating liquors in a certain room of a building, the location of the whole building is to be considered in determining whether it is within the "four hundred feet" of a public school-house on the same street, under the St. of 1882, c. 220, § 1. *Commonwealth v. Jones*, 573.
5. The "four hundred feet" from a building occupied by a public school, named in the St. of 1882, c. 220, § 1, as the distance within which no license of the classes specified shall be granted for the sale of intoxicating liquors in any building on the same street, are to be determined by measuring the nearest point of each building to the other, whether they are close to the line of the street, or some distance from it. *Ib.*
6. At the trial of a complaint for unlawful sales of intoxicating liquors on the Lord's day, if the defendant has an innholder's license, and a license of the first class for the sale of such liquors to be drunk on the premises, covering the time of the alleged sales, the burden of proof is upon him to show that the persons to whom the sales were made were guests who had resorted to his house for food or lodging. *Commonwealth v. Moller*, 533.
7. At the trial of a complaint for unlawfully selling intoxicating liquors to a minor, it is error to rule that a sale of such liquors by a servant in his master's shop, and in the regular course of his master's lawful business, is *prima facie* a sale by the master, although the sale is an illegal sale. *Commonwealth v. Briant*, 463. *Commonwealth v. Stevenson*, 466.

8. At the trial of a complaint for keeping intoxicating liquors with intent to sell the same contrary to law, the evidence tended to prove that the defendant kept lager beer with intent to sell the same to be used as a beverage, and to be drunk on the premises. The judge instructed the jury, that "a license of the sixth class gave to the party holding the same the right to keep for sale and to sell intoxicating liquors for three purposes only, namely, medicinal, mechanical, and chemical, and gave the holder no right to keep for sale or to sell intoxicating liquors to be used as a beverage, and gave no right to keep for sale or to sell intoxicating liquors to be drunk on the premises." *Held*, that the defendant had no ground of exception. *Commonwealth v. Mandeville*, 469.
9. At the trial of a complaint for an unlawful sale of intoxicating liquor on a certain Lord's day, a witness testified that, on the day named, he was at a place, over the door of which was the defendant's name, and that he there saw several sales of intoxicating liquor on that day by the defendant behind the bar in a restaurant kept by him; and, on cross-examination, he testified that he could not identify the man behind the bar, or the defendant. A deputy sheriff testified as follows: "The defendant keeps a small hotel and restaurant, with a bar-room in it." *Held*, that there was evidence proper to be submitted to the jury. *Commonwealth v. Molter*, 533.
10. At the trial of a complaint for an unlawful sale of intoxicating liquor to A., he testified for the government that he bought one half-pint of whiskey of the defendant, paying a certain sum therefor; and he produced a small bottle of fluid, which he said was the same whiskey which he bought of the defendant, in the bottle in which it was delivered. *Held*, that the bottle was properly admitted in evidence. *Commonwealth v. Stevens*, 457.
11. At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the testimony of an officer, who had searched the defendant's premises, that a tumbler which he seized contained intoxicating liquor, is competent, without producing the liquor, or accounting for its absence. *Commonwealth v. Welch*, 473.
12. At the trial of a complaint on the Pub. Sta. c. 101, § 6, for keeping and maintaining "a certain building," used for the illegal keeping and illegal sale of intoxicating liquors, a witness testified that, on a certain day, he was in the defendant's "house," and bought liquor there, and another witness testified that, on a certain day, he was "at the defendant's house, in the front room," and liquor was sold there. *Held*, that there was sufficient evidence to warrant the jury in finding that the defendant kept and maintained the whole building, and that the same or some part thereof was used for the purpose alleged in the complaint. *Commonwealth v. Rooney*, 474.

See COMPLAINT, 3; EVIDENCE, 15.

### JUDGMENT.

The demandant in a writ of entry claimed title to the premises by a deed, which was executed and delivered before, but was not recorded until after,

an attachment of the premises in an action against his grantor. The tenant claimed title under a levy and sale on an execution issued upon the judgment in the action after the demandant's deed was recorded. The judgment was for a sum greater than the *ad damnum* in the writ. *Held*, that the judgment was erroneous, and could be avoided by the demandant; and that he was entitled to the premises. *Safford v. Weare*, 281.

See BOND, 2; EXCEPTIONS, 10; EXECUTOR AND ADMINISTRATOR;  
MILL, 1; SCIRE FACIAS.

### JURISDICTION.

See BOND, 2; EQUITY, 9.

### JURY.

See EQUITY, 14.

### LACHES.

See EQUITY, 6.

### LAND DAMAGES.

See WAY, 1-4.

### LANDLORD AND TENANT.

See ESTOPPEL, 2.

### LAW AND FACT.

See CONTRACT, 2; FOREIGN LAW; MORTGAGE, 8; NEGLIGENCE, 2, 4;  
RAILROAD, 4; WAY, 9.

### LEASE.

See EQUITY, 11; EVIDENCE, 2; FRAUDS, STATUTE OF, 2; TOWN.

### LEGACY.

See DEVISE AND LEGACY.

### LICENSE.

See INTOXICATING LIQUORS, 3-6, 8; RAILROAD, 8; TREE.

### LIEN.

See MECHANIC'S LIEN.

## LIMITATIONS, STATUTE OF.

1. In an action, begun in the fall of 1882, for an injury occasioned by flooding the plaintiff's land in the spring of 1876, and in 1877 and 1878, evidence of the flowage or damage done in the spring of 1876 is properly excluded, the claim being barred by the statute of limitations. *Stanchfield v. Newton*, 110.
2. When the statute of limitations would be a bar to a direct proceeding by the original owner of personal property, it cannot be defeated by indirect action within the jurisdiction where it is law. A title which will not sustain a declaration will not sustain a plea. *FIELD, J., dissenting. Chapin v. Freeland*, 383.
3. Two counters, which belonged to A., were, without his knowledge or authority, placed by B. in a shop built by him on his land, nailed to the floor, and used there. Four years afterwards, B. mortgaged the premises to C., who, eight years later, foreclosed the mortgage, and then sold the premises to D., making no mention of the counters. A., who two years subsequently first learned where the counters were, took them from D.'s possession. *Held*, that D. could maintain replevin against A. for the counters. *FIELD, J., dissenting. Ib.*

See AUDITOR, 2; ESTATES OF DECEASED PERSONS; INFORMATION, 3;  
MORTGAGE, 1; PROMISSORY NOTE, 1.

## LORD'S DAY.

See INTOXICATING LIQUORS, 6, 9.

## MARRIED WOMAN.

See EQUITY, 11.

## MASTER AND SERVANT.

1. If a servant, who is engaged in backing, while standing at his horses' heads, a loaded van, is directed by his master to mount the van and drive it under a gateway, over which there is a sign, and then to back down, the master being familiar with the practice of so driving vans, and the servant, though an experienced teamster, never having driven under the gateway before, and their relative positions are such that the master has better means of observation than the servant, whose attention is devoted chiefly to the management of his horses, and of seasonably appreciating the dangers attending the act, and the servant, in following the directions of the master, is injured by coming in contact with the sign, the servant may maintain an action against the master for such injury. *Haley v. Case*, 316.
2. In an action for personal injuries received by the plaintiff while in the defendant's employ, through the alleged neglect of the defendant to provide the plaintiff with safe and suitable machinery and tools, and to give him suitable and proper instructions as to the manner of doing his work,

the judge declined to rule, as requested by the defendant, that, "unless the jury find that the plaintiff was a man of manifest imbecility, their verdict must be for the defendant, because the defendant had a right to assume that the plaintiff would protect himself by whatever precautions were necessary." *Held*, that the defendant had no ground of exception.

*Atkins v. Merrick Thread Co.* 431.

3. In an action by a boy thirteen years old against a corporation for personal injuries sustained, while in the defendant's employ, by getting his hand in a machine, called a winder, it appeared that this machine was about four feet and four inches long, and two feet and ten inches high, consisting of three smooth steel cylinders, two large ones, with a small one between them on which cotton was wound; that they revolved about fifteen to twenty times a minute; that the gears and pulleys connected with them were covered, but there was no fence or other protection against danger from the other part of the machine; that a machine called a card-grinder stood about four and one third feet from the winder, and the plaintiff, in the course of his work, was required to pass between these machines, but did not work on the winder; and that the plaintiff had been in the defendant's employ three weeks and three days when he was injured. *Held*, that the winder was not a peculiarly dangerous machine; that the defendant was not liable for neglect to fence it; and that, if the defendant sufficiently instructed the plaintiff as to the dangers of the machine, the action could not be maintained. *Rock v. Indian Orchard Mills*, 522.
4. In an action by a boy against a corporation for personal injuries sustained, while in the defendant's employ, by getting his hand in a certain machine, between which and another machine he was required to pass in doing his work, if it appears that the first-named machine is not peculiarly dangerous, evidence is inadmissible to show that a gate might have been put up at slight expense in front of the machine, or that either machine might as well have been put in another part of the room. *Ib.*
5. In an action for personal injuries sustained by a boy while in the defendant's employ, there was evidence that the injuries were caused by his playing with a machine, on which he was not at work, and which he had been cautioned to keep away from. *Held*, that the plaintiff had no ground of exception to a ruling given to the jury, that, if he was playing with the machine, he could not recover. *Ib.*
6. In an action for personal injuries sustained by a boy while in the defendant's employ, by his hand coming in contact with a machine, on which he was not at work, but which he was required to pass, the bill of exceptions stated that the plaintiff excepted to certain portions of the judge's charge, and set forth certain detached sentences of the charge as those excepted to. One of these was, that there was nothing in the nature of the machine which rendered it peculiarly and especially dangerous. The plaintiff did not ask to go to the jury on this question. *Held*, that he had no ground of exception. *Ib.*

See EXCEPTIONS, 7; INTOXICATING LIQUORS, 7; PRINCIPAL AND AGENT, 1.

## MECHANIC'S LIEN.

A person, who furnishes lumber at a certain price per thousand feet, at different times, under an entire contract, in the erection of a building, loses his lien, under the Pub. Sta. c. 191, § 6, if he neglects to file his statement of the amount due him within thirty days after the last item is furnished which is actually used in the erection of the building. *Kennebec Framing Co. v. Pickering*, 80.

## MILL.

1. On a complaint, under the mill act, brought by A. against B., the Superior Court determined that B. maintained his dam higher than he had a right to maintain it in that part of the year between April 12 and November 1. After this adjudication, the jury found that the height of the dam between April 12 and November 1 should be established at its height as viewed on October 16, 1883, and that it should be left open a space of not less than ten feet in width; and fixed the past damages, and determined what would be proper compensation for future damages. B. paid both sums. A. afterwards brought an action against B. for maintaining his dam higher than he had a right to maintain it. The judge ruled, "that the former finding of the court and jury should be construed to mean that the defendant was not required to alter his dam as to height from what it was on October 16, 1883; and that the former jury had a right to fix the height as they did fix it, although the finding of the court, that it was higher than the defendant had a right to have it, had been made." *Held*, that A. had no ground of exception. *Atkins v. Witherell*, 482.
2. The St. of 1791, c. 32, incorporated a navigation company, and authorized it to build such dams, locks, and canals as were necessary for its purposes. The St. of 1880, c. 148, which was accepted by the corporation, provided that the corporation might maintain and use its dams, locks, and canals "as at present constructed;" authorized it to construct other dams, locks, and canals for the purpose of creating a water power to use or to lease for manufacturing purposes; provided that, for those purposes, the corporation should have all the powers and privileges, and be subject to all the duties, liabilities, and restrictions, set forth in the general laws relating to manufacturing and other corporations; relieved the corporation from the obligation to support its dams, locks, and canals for the purposes of navigation; and discontinued its canals as a navigable highway. *Held*, that the corporation, by accepting the St. of 1880, waived its right to build and maintain its dam at a greater height than that of the dam when the statute was passed; and that, if it did so, a person injured thereby could maintain a complaint under the mill act, Pub. Sta. c. 190. *Comins v. Turner's Falls Co.* 443.

See DEED, 5.

## MORTGAGE.

I. *Real Estate.*

1. A mortgage of land was given to secure the payment of a certain sum of money in instalments at different dates, for which promissory notes were given. A. held two of the notes by gift from a person, to whom they were indorsed by the mortgagee, with an oral agreement to hold the mortgage in trust to secure them. The mortgagee afterwards transferred the other notes and the mortgage to B., who had notice of this agreement. B. received payment of his notes, surrendered them to the mortgagor, and afterwards assigned the mortgage to A. Interest was paid on the two notes held by A., and the mortgage was recognized as outstanding by the mortgagor, who conveyed the land to C. by a deed which also referred to a mortgage as outstanding. *Held*, that A. could maintain a writ of entry to foreclose the mortgage against C., brought within twenty years of such payment of interest, although the notes were barred by the statute of limitations. *Norton v. Palmer*, 433.
  2. A conveyance of land made by a mortgagee, which declares that it is made by virtue of and in execution of the power contained in the mortgage, and of every other power him thereto enabling, operates as an assignment of the mortgage, even if the fee is not conveyed by reason of a defect in the execution of the power of sale; and, after an entry has been made for breach of the condition of the mortgage, the assignee may maintain a writ of entry against a person in possession who shows no title to the land. *Holmes v. Turner's Falls Co.* 590.
- See DEED, 4; EQUITY, 5; ESTOPPEL, 2; QUIETING TITLE; TROVER, 1.

II. *Personal Property.*

3. In an action of replevin by a mortgagee against an officer, who attached the property on a writ against the mortgagor, the issue was whether the mortgaged property had been delivered to and retained by the mortgagee before the attachment. The judge, who tried the case without a jury, ordered that judgment for a return of the replevied property be entered for the defendant, and allowed a bill of exceptions, which stated that the mortgagor was a sub-contractor under B., and used the replevied property in his business; that after a breach of the conditions of the mortgage, and before the attachment, C., as the agent of B., and as the agent of the plaintiff to take possession of the property for the breach of said conditions, with the assent of the mortgagor assumed control of the business, the mortgagor remaining to assist him, and the property continued to be used as before, but under C.'s control. The exceptions further stated that the judge found that, when the property was attached, the mortgagor was in actual possession and use of the property subject to the control of C. *Held*, that, in the absence of a finding that the property was "delivered to and retained by" the mortgagee, as required by the Gen. Sts. c. 151, § 1, the court could not say, as matter of law, that the judgment was erroneous. *Citizens' National Bank v. Oldham*, 379.

4. In an action of replevin against an officer, who had attached the chattels replevied as the property of B., it appeared that B. had mortgaged them to A., who subsequently, but before the attachment, took possession of them, with the consent of the mortgagor, but without foreclosure, and that the mortgagor made an oral release or gift to him of the equity of redemption. *Held*, that the judge rightly refused to instruct the jury, as requested by the defendant, that a mortgagor of chattels has an indefeasible right to redeem as between himself and the mortgagee, unless he has parted with such right for some new consideration, or unless the mortgage has been duly foreclosed. *Stone v. Jenks*, 519.

See EQUITY, 8; INSOLVENT DEBTOR, 2; LIMITATIONS, STATUTE OF, 3

### NECESSARIES.

See TRUSTEE PROCESS.

### NEGLIGENCE.

1. In an action for personal injuries occasioned to the plaintiff by the falling of an hydraulic elevator in a building owned by the defendant, while the plaintiff was riding therein, the defendant offered evidence tending to show that, immediately after the accident, the builder of the elevator examined its machinery, valves, and connections, and found them in perfect order, and nothing broken or injured; and that he had examined the shut-off valve in the cellar from time to time, and had always found it in perfect order. The defendant called certain experts, who testified, in substance, that all appliances for safety in general use were connected with this elevator, and were in good order; that they had examined its machinery and connections, and found everything in good working order; that there were no appliances known to them to prevent air from getting into cylinders when the street pipe was opened, except such as were attached to this machine; that the closing of the shut-off valve in the cellar would have no effect on the running of the elevator, as the pipe between it and the cylinders would remain full of water all the time, whether closed or open, owing to the fact that the cellar pipe was lower than the street main; and that they did not consider that there was any danger to hydraulic elevators from opening the street mains. The defendant, among other things, asked the judge to instruct the jury that, "if the elevator had all known safety appliances, and the defendant had no knowledge or reasonable cause to believe that there was any danger from air coming from the street pipe, and an accident happened therefrom, he would not be liable, even if he had knowledge that the water was being shut off." The judge refused to give this instruction. *Held*, that the defendant had good ground of exception. *Shattuck v. Rand*, 83.
2. The parents of a boy about four years old permitted him to walk in the streets of a city in the daytime under the care of his sister, who was nearly eleven years old. In an action against a street railway corporation for an injury sustained by the boy while so walking, there was evidence that the



girl was accustomed to take her brother to walk, and that she was a girl of ordinary intelligence, and bright about doing errands. *Held*, that it could not be ruled, as matter of law, that the parents of the boy were negligent in permitting him to go upon the streets with his sister, or that she had not sufficient intelligence and discretion to be entrusted with his care. *Collins v. South Boston Railroad*, 301.

3. In an action against a street railway corporation for injuries occasioned to the plaintiff, while on a street crossing, by being struck by a car of the defendant, there was evidence that the driver of the car, as it approached the crossing, was looking back at a car which had passed. *Held*, that there was evidence of negligence on the part of the driver. *Ib.*
4. In an action against a street railway corporation for an injury occasioned, in the daytime, to a boy about four years old, the plaintiff's evidence tended to show that he was in the care of his sister, who was about eleven years old and of ordinary intelligence; that, after starting to cross a street on the cross walk, the sister, who had hold of her brother's left hand, saw a car approaching, and kept on until they were near the track on which the car was approaching, and nearly abreast of the horses; that then she, becoming frightened, pulled away from her brother, or he from her, and left him, going either in front of the horses or in the rear of the car, and he, after being left, ran in front of the horses, and was knocked down either by the feet of the horse which was the farther from him when he started to run, or by the side of the dasher of the car, and was drawn under the car and injured. The rate of speed of the car, its distance when the sister first saw it, and the persons and objects in the street which might have influenced her conduct, were differently described by different witnesses. *Held*, that it could not be ruled, as matter of law, that the sister was not exercising the care over her brother which might reasonably be expected of a child of her age. *Ib.*

See EXCEPTIONS, 7; MASTER AND SERVANT; PRINCIPAL AND AGENT, 2;  
RAILROAD, 4, 5; WAY, 9, 10.

#### NOTICE.

See INTOXICATING LIQUORS, 1; PROMISSORY NOTE, 4; WAY, 11, 12.

#### NOVATION.

See ACTION, 4.

#### NUISANCE.

See INTOXICATING LIQUORS, 11, 12.

#### OFFICER.

See ASSAULT; BOND, 1; EXCEPTIONS, 10; REPLEVIN, 1.

#### ORDER.

See CONTRACT, 2.

## PARTNERSHIP.

A surviving partner, who has bought all the assets of the partnership except letters patent for a product, and who uses the patent in the manufacture of such product, against the objection of the administrator of the estate of the deceased partner, is liable, upon a bill in equity by the administrator for an account, for one half of the profits of the manufacture and sale of such article, less all costs and expenses incurred therein by the surviving partner, and a fair allowance for manufacturer's profits; but the administrator is not entitled to interest, except from the date of filing his bill. *Freeman v. Freeman*, 98.

See INSOLVENT DEBTOR, 3.

## PATENT.

See CONTRACT, 3; PARTNERSHIP.

## PAUPER.

See ASSIGNMENT, 1.

## PAYMENT.

See ACTION, 4; CONSIGNOR AND CONSIGNEE.

## PERPETUITY.

See DEVISE AND LEGACY, 1.

## PLEADING.

I. *Parties to Action.*

See ACTION, 3, 4.

II. *Declaration.*

See ACTION, 5; GUARANTY, 2; INTOXICATING LIQUORS, 2; PRINCIPAL AND SURETY.

III. *Answer.*

See CONSIGNOR AND CONSIGNEE.

## PLAN.

See DEED, 2; GRANT, 2.

## PLEDGE.

If a promissory note, held in pledge, is delivered by the pledgee to the pledgor for the purpose of procuring it to be discounted, and a third person advances money upon the note, in good faith, and in ignorance of the pledgee's title, he can retain the note, as against the pledgee, as security

for the advance; but if such person knew, at the time the note came into his possession, of the pledgee's title, he cannot hold it, as against the latter, either for an advance of money upon it as a loan to the pledgor, or as security for any former indebtedness of the pledgor to him. *Kellogg v. Tompson*, 76.

See ACTION, 5.

#### POLICE OFFICER.

See ASSAULT; CITY, 2.

#### POND.

See COMPLAINT, 1; EVIDENCE, 2; FISHING; TOWN.

#### POOR DEBTOR.

1. If a person, who, upon applying to take the oath for the relief of poor debtors, has entered into a recognizance under the Pub. Sts. c. 162, § 28, commits a breach of the same by departing before the conclusion of his examination, his arrest, two days subsequently, and at a place remote from that of the examination, is illegal. *Morgan v. Curley*, 107.
2. After the breach of a recognizance, entered into under the Pub. Sts. c. 162, § 28, has been committed by the debtor, in departing before the conclusion of his examination, the magistrate has no power to annex to the execution a certificate authorizing the arrest of the debtor. *Ib.*
3. The examination of a debtor, who has applied to take the oath for the relief of poor debtors, is "pending," within the meaning of the Pub. Sts. c. 162, § 49, so that the creditor may file charges of fraud against him, until the announcement of the decision of the magistrate, although the hearing of evidence and arguments has closed, and the magistrate has continued the cause for the purpose of considering the questions of law and fact involved therein. *Andrews v. Cassidy*, 96.

See FALSE IMPRISONMENT.

#### POWER.

See MORTGAGE, 2; TRUST AND TRUSTEE, 1.

#### PRESCRIPTION.

See ADVERSE POSSESSION; RAILROAD, 2.

#### PRESUMPTION.

See TREE.

#### PRINCIPAL AND AGENT.

1. S., the owner of S.'s express, sold the business to A., who leased it, for a certain sum monthly, to B., who continued to conduct the business, under

the lease, in the name of S.'s express. C., who was employed in the business before the sale to A., continued in the service of A., and of B. afterwards; and as such servant, after the lease to B., received from D., who had dealt with him while he was employed by A., goods to be delivered to persons ordering them through said express, the price of which was to be collected and returned to D. The price of the goods was collected, but was not accounted for to D., who brought an action against A. to recover the same. D., who was notified by S. of the sale to A. soon after it took place, never saw A., or had any actual notice of the lease to B., or of his conducting the business under the lease. Although that fact was published in a newspaper and announced in circular notices sent by B. to persons dealing with the express, D. never received the newspaper or circular. The orders on which the goods were delivered to C. bore the printed heading, "S.'s express, B. agent." *Held*, that, on these facts, the judge, who tried the case without a jury, was warranted in finding for the defendant. *Rich v. Crandall*, 117.

2. In an action by an insurance company against its agent for failure to cancel a policy of insurance, as directed, it appeared that the defendant issued a policy in the plaintiff company upon certain property, containing the provision that "it may also be terminated at any time at the option of this company, on giving written or verbal notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of the policy," and notified the plaintiff of it; that the plaintiff, on the same day, notified the defendant by letter that it declined to take the risk, and directed him to cancel the policy; and that this letter was received by the defendant on the next day. There was evidence tending to show that the defendant could have notified the insured within half an hour after receiving the plaintiff's letter; that the defendant, being also the agent of another insurance company, on that day wrote a policy in that company, which he intended to take the place of the plaintiff's policy, but did not notify the insured of the other policy, or of the cancellation of the plaintiff's policy, and took no steps to effect such cancellation until after the insured property was burned, which occurred five days later. *Held*, that it was competent for the judge, who tried the case without a jury, to find, from this evidence, that the defendant did not exercise that diligence which his duty to the plaintiff required; and that the action could be maintained. *Phœnix Ins. Co. v. Frissell*, 513.

See ACTION, 1, 3, 4; ATTORNEY AND COUNSEL; CONSIGNOR AND CONSIGNEE; EQUITY, 11; EVIDENCE, 5; EXCEPTIONS, 10; FALSE IMPRISONMENT; PROMISSORY NOTE, 1.

## PRINCIPAL AND SURETY.

If the declaration in an action contains a count in contract and one in tort, not alleged to be for the same cause of action, and a demurrer to the declaration is sustained for misjoinder of counts, and the count in tort is stricken out, and, by amendment, a count in tort is added for the same cause of action, and this is properly averred, such amendment does not

discharge the sureties on a bond given to dissolve an attachment in the action, although the amendment is made without notice to the sureties. *Kellogg v. Kimball*, 124.

See BOND, 2, 3; TRUST AND TRUSTEE, 2-6.

## PROBATE COURT.

See ASSIGNMENT, 2; BOND, 3; GUARDIAN AND WARD, 1.

## PROMISSORY NOTE.

1. If a promissory note is attested, before delivery, by a person not a party to it, without the procurement or knowledge of either party, and the note is accepted by the payee without any knowledge that it has been attested, and without relying upon the attestation as a part of the contract, the attestation is not such a material alteration as will make the note void, but may be stricken out; and an action may be maintained upon the note. *Church v. Fowle*, 12.
2. Under the Gen. Sts. of Kentucky, c. 22, §§ 6, 21, promissory notes, though negotiable in form, are subject, in the hands of an indorsee, to any defence the maker has against the payee before notice of the transfer. *Shoe & Leather Bank v. Wood*, 563.
3. If the sole consideration of a promissory note, which is not negotiable by the law of the State where it is made and is payable, is an agreement to deliver certain goods, and the payee fails in business and is unable to deliver a portion of the goods, in an action upon the note, by an indorsee against the maker, in this Commonwealth, failure of consideration may be set up in defence thereto. *Ib.*
4. The indorser of a promissory note became insolvent and absconded from the Commonwealth before the maturity of the note, and his address was known only to his counsel, a confidential friend, and his immediate family. Before he absconded he left his address with his counsel, who had charge of his affairs, and it was understood between them that his counsel should send him anything relating to his affairs that he deemed important, and that everything sent to his former place of business should be turned over to his counsel. When the note became due, the indorser had no place of business in this Commonwealth; but his sign remained over the door of the store he occupied before he absconded, and his assignee under a voluntary assignment for the benefit of his creditors was there. The indorser had a domicile in a town of the Commonwealth other than that in which he did business, and this domicile he retained after absconding. The holder of the note knew of the insolvency and of the assignment, but did not know that the indorser had ceased to do business at his former place of business, or that he had a residence here, and, when the note matured, sent notice of its non-payment to the indorser's former place of business. The indorser did not receive the notice, in consequence of his counsel's telling the assignee not to send to him notices of protests. *Held*, that due diligence was used in giving the notice. *Bank of America v. Shaw*, 290.

5. A. made a promissory note, payable to a town, which was also signed, before delivery, by a firm composed of B. and C. A. held, at the same time, a note of equal amount, signed by B. and C. individually, as an offset for another note of the same amount made by A. to D. for the use of B. and C.; and the money received by B. and C. from the town on the first-named note was paid by them to D. After this A. held the note signed by B. and C. individually as an offset or protection for his liability upon the first-named note; and there was no other consideration for the first-named note between the makers. A. died, and an executor of his will was appointed. A.'s daughter, who was also the wife of B., in settlement with the executor for her share of A.'s estate, made and signed with the other heirs of A. an agreement, by which they released to her all their interest as such heirs in certain real estate, and "also all notes held by A. against B.," and she released to them all her interest in A.'s estate, real and personal. In execution of this agreement, the executor delivered to A.'s daughter the note signed by B. and C. individually, which was received by her as a part of her share of said estate. B. and C. paid interest on the first-named note up to a certain day, when the town made demand upon A.'s executor for payment of the note. Subsequently, two of A.'s heirs, one of whom was the executor, gave to the town their promissory note for the amount of the first-named note, and took from the town treasurer a certificate that it was "given as a guaranty or indemnity" to the town for the first-named note, "which last-named note has been left with" the executor's attorney "for collection," with a stipulation that the makers of the new note were to indemnify the town against the expenses of collection. The town afterwards brought an action on the first-named note against B. and C. The defendants offered to show, by C., that he had paid to A.'s daughter his one half of the note which she received from A.'s executor; and also offered to show, by the plaintiff's treasurer, that he had told the defendants that the note in suit was paid by A.'s executor, and delivered up to him. The treasurer testified that the note in suit was paid him by the executor, and that he surrendered the note and gave up all claim to it. *Held*, that the evidence admitted and excluded showed no equitable defence to the action, within the St. of 1883, c. 228, § 14. *Northborough v. Wood*, 551.

See ACTION, 5; CONFLICT OF LAWS; CONSTITUTIONAL LAW, 1; EVIDENCE, 4, 10, 12; GUARANTY; INSOLVENT DEBTOR, 4; MORTGAGE, 1; PLEDGE.

### QUIETING TITLE.

Four of six heirs of A., who had previously conveyed to B. all their right, title, and interest in certain land, also, so far as they had power, sold to B. the shares — to which they supposed themselves entitled by inheritance — of the other two heirs, whose whereabouts was unknown. B. delivered to C., in trust, two promissory notes for the amount of said two sixths of the land, each payable to one of the absent heirs, whenever the payee, "his heirs, assigns, or legal representatives, shall show me established

and confirmed, by conveyance or otherwise, in the legal title to one undivided sixth part of " said land, " now supposed to be outstanding in the " payee. The payment of these notes was secured by a mortgage of said two sixths, given by B. to C. in trust for the two absent heirs, by order of the Superior Court, which assigned said two sixths to B. upon his petition for partition of the land. No payment was made of the debt secured by the mortgage, which was recognized by B. as an existing incumbrance in deeds subsequently executed by him; and neither the death of the two absent heirs, nor the succession of the remaining heirs of A. to their interest in the land, was established. *Held*, that a subsequent grantee of the land could not maintain a petition, under the St. of 1882, c. 237, to have said two sixths declared free of the incumbrance of the mortgage, although B. and those claiming under him had been in uninterrupted possession of the land for twenty years. *Delano v. Smith*, 490.

#### RAILROAD.

1. Under the St. of 1881, c. 280, the manager of the Troy and Greenfield Railroad and Hoosac Tunnel has no power, for the purpose of saving expense to the Commonwealth, to make an order which violates a contract entered into, under the St. of 1880, c. 261, between said manager and a certain railroad corporation, by the terms of which the corporation is entitled to charge the Commonwealth for the number of miles run by the switching engines of the corporation upon the first-named railroad. *Attorney General v. Fitchburg Railroad*, 40.
2. A right of way by prescription cannot be acquired over a railroad, whose location runs through the land of the person claiming such right, while the railroad corporation neglects to comply with a decree of the county commissioners, under the Rev. Sta. c. 89, § 61, made upon the petition of such landowner, that the corporation give security for the payment of damages for the land taken, and no payment or settlement of such damages is made. *Smith v. New York & New England Railroad*, 21.
3. A railroad corporation is liable for personal injuries occasioned to a passenger by the unsafe condition of the platform at a station, along which he was walking, after alighting from a train, for the purpose of leaving the station to go to his home, if the platform at that place was fitted and intended for the use of passengers, or was so arranged as to invite them to use it, although the corporation was under no obligation to furnish such a platform, and the proper mode of egress from the station to the nearest highway was in an opposite direction to that in which the passenger was going; and the fact that he intended, after leaving the platform, to cross the railroad at a place where he had no right to cross it, does not make him a trespasser, or mere licensee, when and where he was injured. *Keefe v. Boston & Albany Railroad*, 251.
4. In an action against a railroad corporation for personal injuries occasioned to a passenger by coming into collision with a baggage truck, while walking along the platform at a station, after alighting from a train, the questions whether he backed against the truck, or was struck by

it, whether he or the servant of the corporation who was pulling the truck was in the exercise of due care, and whether the platform was properly lighted, are for the jury. *Keefe v. Boston & Albany Railroad*, 251.

5. In an action against a railroad corporation for an injury sustained by the plaintiff while crossing the tracks of the defendant railroad, there was evidence that the plaintiff approached the tracks from the northward by a path which did not connect with a public street, but which for some distance northward of the tracks had been used by the public for twenty-five years, and at a more remote point, in the same direction, for fifteen or sixteen years; that the path was from three to five feet in width, and well defined; that on each side of the path, near the railroad, there was a ridge two or three feet in height, caused by dirt being thrown up in cleaning ditches on the side of the railroad, with a clear passageway left for the path through the ridge; that there was no fence or other obstruction to passing across the railroad from the path, and no objection had been made by the servants of the defendant to persons crossing there, except when cars were approaching; that, when freight cars were left standing on the tracks, openings were sometimes left between them opposite the path; that at some distance to the westward of the place where the path crossed the tracks was a covered culvert, and between the path and the culvert was a well-worn and smooth space between two lines of tracks; that to the westward of the culvert there was planking between the rails, and a path on the south side of the tracks near the platform of a station of the railroad; and that some persons using the path when coming from the northward, on reaching the tracks, went by this space between the two tracks to the path on the south side, and others went in different directions. *Held*, that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to use the path to cross the tracks; and that, in the absence of evidence that the injury to the plaintiff was occasioned by the wilful or reckless misconduct of the defendant or its agents, the action could not be maintained. *Wright v. Boston & Albany Railroad*, 296.

See STATUTE, 2.

#### RECEIVER.

See ACTION, 3.

#### RECOGNIZANCE.

See BOND, 2; POOR DEBTOR, 1, 2.

#### RECORD.

See JUDGMENT.

#### RELIEF ASSOCIATION.

See BENEFICIARY ASSOCIATION.



## REMAINDER.

See DEED, 1.

## REPLEVIN.

1. Under the Pub. Sta. c. 184, § 12, the officer, before serving the writ in an action of replevin, is not required to have the sureties on the replevin bond approved by the defendant, or by a master in chancery; and § 18, providing that the sureties "may be" so approved, does not affect the plaintiff's right to maintain the action in the absence of such approval. *Stone v. Jenks*, 519.
2. In an action of replevin for "one Emerson piano, style C, No. 80964," the defendant, from whose possession such a piano was taken on the writ, claimed title as an innocent purchaser from A. The plaintiff offered evidence tending to show that he lent a sum of money to B., who gave him a promissory note therefor. The plaintiff then offered in evidence the following papers: 1. Said note, signed "A. per B., Atty." 2. A writing on the back of the note, by which it was agreed that the plaintiff should "hold the assignment of the lease on piano until this note is paid," and, upon failure to pay the interest, the plaintiff should "take the piano in the lease and sell the piano and apply the proceeds to pay this note," and which was signed "A. per B., Atty." 3. An instrument, signed by C., to whom B. paid the money lent by the plaintiff, and stating that, in consideration of a certain sum paid to him by the plaintiff, C. transferred and assigned to the plaintiff all C.'s "right, title, and interest in and to one Emerson piano, style C, No. 80964, being specified in a certain lease." 4. An instrument, in which goods "hired and received of C." were described as "one Emerson piano, style C, No. 80964;" and which was signed as follows: "Witness my hand and seal. A. per B., Atty." There was no evidence of the existence of any written power of attorney from A. to B. The judge excluded the several papers offered in evidence; and ruled that the evidence introduced was insufficient to make out the plaintiff's case. *Held*, that the plaintiff had no ground of exception. *Chaffee v. Blaisdell*, 538.

See LIMITATIONS, STATUTE OF, 8; MORTGAGE, 3, 4.

## REPORTS OF DECISIONS.

See SUPREME JUDICIAL COURT.

## RESERVATION.

See DAMAGES, 2; DEED, 5; EVIDENCE, 6, 7, 14.

## REVOCATION.

See WILL.

## RIOT.

See CONVICTION.

## SALE.

See ACTION, 4.

## SAVINGS BANK.

See GIFT.

## SCHOOL-HOUSE.

See INTOXICATING LIQUORS, 4, 5.

## SCIRE FACIAS.

It is no defence to a *scire facias* against the indorser of the writ in an action, that the plaintiff, in taxing his costs in that action, in which he was the defendant, fraudulently procured the allowance by the clerk of various sums to which he was not lawfully entitled. *Sherburne v. Shepard*, 141.

## SEARCH WARRANT.

See COMPLAINT, 3.

## SEWER.

See ACTION, 6.

## SHIP.

1. The St. of 30 & 31 Vict. c. 124, § 7, provides that, if a seaman who is ill has not, through the neglect of the master or owner, been provided with proper food, or water, or anti-scorbutics, the master or owner shall be liable to pay all expenses properly and necessarily incurred by reason of such illness (not exceeding in the whole three months' wages) by the seaman, but that this "shall not operate so as to affect any further liability of any such owner or master for such neglect, or any remedy which any seaman already possesses." *Held*, that this statute did not take away the right of a seaman to maintain an action against the owners of the vessel for injuries sustained, to a greater amount than three months' wages, by reason of the failure of the master to furnish proper food and anti-scorbutics, as provided for in the shipping articles. *Baxter v. Doe*, 558.
2. In an action by a seaman against the owners of a vessel for injuries caused by the neglect of the master to furnish suitable provisions and

anti-scorbutics, as required by the shipping articles, evidence of the similar sickness, under the same conditions, of others of the crew on board the vessel about the time of the plaintiff's sickness, is admissible. *Barter v. Doe*, 558.

3. A seaman, who has shipped on an English vessel under articles sanctioned by the Board of Trade in pursuance of the St. of 17 & 18 Vict. c. 104, and which require the supplying of specified provisions and anti-scorbutics to the crew during the voyage, may maintain an action against the owners of the vessel for injuries caused by the neglect of the master to comply with such requirements. *Ib.*

See WRIT.

### SPECIFIC PERFORMANCE.

See EQUITY, 2; ESTATES OF DECEASED PERSONS; TRUST AND TRUSTEE, 1.

### SPENDTHRIFT.

See ASSIGNMENT, 2.

### STATUTE.

1. The St. of 1867, c. 73, in § 1, authorized an aqueduct company to take and use the waters of two ponds named, and of a certain lake. In § 5, it was provided that nothing in the act should be construed to authorize the company "to raise the water of any of said ponds above high-water mark, nor to drain any of them below low-water mark." *Held*, that the restriction applied to the lake as well as to the ponds. *Brickett v. Haverhill Aqueduct*, 394.
2. Under the St. of 1882, c. 121, § 1, providing that the Treasurer of the Commonwealth shall assign to the corporation therein named all the shares of the capital stock of the corporation which are owned by the Commonwealth, or which belong to funds over which the Commonwealth has exclusive control, in exchange for certain bonds of the corporation, at a rate specified, and that thereupon the corporation "shall hold and dispose of the shares of stock so assigned to it as its absolute property," the corporation may divide such shares among its stockholders. *Commonwealth v. Boston & Albany Railroad*, 146.

See ACTION, 2; APPEAL; CITY; EVIDENCE, 2; FISHING, 2; GUARDIAN AND WARD; MILL, 2; PROMISSORY NOTE, 2; RAILROAD, 1; SUPREME JUDICIAL COURT.

### STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

### STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

## STATUTES CITED, EXPOUNDED, ETC.

## ENGLISH STATUTES.

43 Eliz. c. 4. Charity	27	20 & 21 Vict. c. 85. Divorce	363
21 Jac. I. c. 16. Statute of Limitations	390	30 & 31 Vict. c. 124, § 4, <i>cl.</i> 5. Merchant Shipping Act	560
3 & 4 Wm. IV. c. 27. " "	390	————— § 7. " "	560
17 & 18 Vict. c. 104, § 109. Merchant Shipping Act	560	36 & 37 Vict. c. 66. Practice	378

## STATUTES OF THE UNITED STATES.

March 2, 1867, § 35.	Bankrupt	20
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## STATUTES OF KENTUCKY.

Gen. Sts. c. 22, §§ 6, 21.	Promissory Note	567
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## STATUTES OF THE COMMONWEALTH.

1783, c. 32, § 9. Executor and Administrator	230	1865, c. 43, § 2. Trustee Process	374
1786, c. 13. Statute of Limitations	389	1866, c. 120. Senatorial Districts	606, n.
1791, c. 32. Locks and Canals on Connecticut River	443	1867, c. 73, §§ 1, 2. Haverhill Aqueduct	395
1798, c. 59. Aqueduct	395	————— § 5. " "	398
1799, c. 31, § 1. Boston	201	1868, c. 81. Massachusetts Society for the Prevention of Cruelty to Animals	26
————— § 2. " "	202	———— c. 212, § 8. Cruelty to Animals	27
1803, c. 133. Reporter of Decisions	36	1869, c. 344, § 7. " "	27
1807, c. 75. Statute of Limitations	389	1871, c. 159, § 2. Charlestown	276
1831, c. 17. Boston	202	1872, c. 85, § 2. " "	276
1833, c. 128. " "	202	———— c. 303. Sidewalk	203
1846, c. 167, §§ 9-12. " "	275	1873, c. 253, § 3. Guardian	479
————— § 13. " "	276	———— c. 286, § 12. Charlestown	276
1848, c. 124. Lowell Traders and Mechanics' Ins. Co.	411	1874, c. 43. Reporter of Decisions	36
1853, c. 414, § 4. Railroad	299	———— c. 248. Trial	182
1854, c. 76. Traders and Mechanics' Ins. Co.	410	———— c. 372, § 148. Railroad	299
———— c. 448, § 41. Boston	204	———— c. 375. Association	224
1856, c. 252, § 36. Insurance Companies	412	1875, c. 80, §§ 1, 2. Boston Water Board	277
1861, c. 105, §§ 11, 13. Charlestown	276	———— c. 209. Municipal Indebtedness	277
1864, c. 208, §§ 1, 5. Tax	413	———— c. 212. Trial	182
1865, c. 43, § 1. Trustee Process	375	1876, c. 190. Senatorial Districts	606, n.

1877, c. 204. Association	224	1882, c. 121. Boston and Albany Railroad	154
1878, c. 141, § 2. Insurance Companies	414	— c. 220, § 1. Intoxicating Liquors	574
— c. 244, § 3. Boston Police	93	— c. 237. Mortgage	490
— — — § 10. " "	94	1883, c. 223, § 14. Superior Court	479, 551
1879, c. 280, §§ 1-3. Decisions of Supreme Judicial Court	37	1884, c. 181, § 9. Decennial Census	606, n.
1880, c. 148. Turner's Falls Co.	445	— c. 236. Insolvency	47
— c. 261. Troy and Greenfield Railroad and Hoosac Tunnel	41	— c. 320, §§ 8, 11. Civil Service	95
1881, c. 166, § 1. Fire Insurance	143	1885, c. 27. Superior Court	458
— c. 280, § 1. Troy and Greenfield Railroad and Hoosac Tunnel	41	— c. 90, § 1. Intoxicating Liquors	597
— — — § 4. " "	44	— c. 266, § 6. Boston	204
1882, c. 36. Way	489	— c. 323, § 2. Boston Police	93
		— — — § 3. " "	94

## REVISED STATUTES.

c. 7, § 5, cl. 2. Tax	28	c. 97, §§ 63, 65. Bond	108
c. 37, §§ 1-39. Insurance Companies	411	c. 101, § 51. Writ of Entry	389
c. 39, § 61. Railroad	23	c. 119, § 1. Statute of Limitations	389

## GENERAL STATUTES.

c. 12, §§ 22, 35. Tax	577	c. 113, § 26. Equity	179
c. 46, § 6. Shade Trees	505	c. 151, § 1. Mortgage	382
c. 63, § 102. Railroad	299	c. 154, § 1. Statute of Limitations	389
c. 102, § 15. Executor and Administrator	223	c. 155, § 12. " "	386

## PUBLIC STATUTES.

c. 11, § 5, cl. 3. Tax	26	c. 78, § 4. Statute of Frauds	123
— § 18. " "	588	c. 85. Bastard	512
— § 34. " "	278	c. 91, §§ 12, 24, 27. Fish	75
c. 27, §§ 78, 85. Town	532	— § 16. " "	73
c. 28, § 14. City	606, n.	c. 100. Intoxicating Liquors	535
c. 29, § 9. Municipal Indebtedness	277	— § 9, cl. 2, 5. " "	597
— § 14. " "	278	— § 10. " "	470
c. 32, § 11. Record of Town Clerk	468	— § 24. " "	464
c. 50, § 22. Sidewalk	203	— § 25. " "	11
c. 52, § 18. Way	537	— §§ 31, 37. " "	472
— § 19. " "	489	c. 101, § 6. Nuisance	474
c. 54, § 6. Shade Trees	505	— § 7. " "	573
		c. 106, § 77. Gas Company	420
		c. 110, § 18. Aqueduct	397

c. 112, § 61. Railroad	153	c. 161, §§ 61 & seq. Attachment	212
—— § 195. " "	299	—— § 74. " "	521
c. 115, § 8. Association	224	—— §§ 74 & seq. " 16,	214
c. 119, § 94. Fire Insurance	410	c. 162, § 17. Poor Debtor	60
—— § 139. " "	143	—— § 28. " "	107
c. 127, §§ 1, 24. Will	69	—— § 49. " "	97
c. 134. Executor and Administrator	389	c. 166, § 10. Executor and Administrator	229
c. 136, § 5. Estates of Deceased Persons	228	c. 167, § 2, cl. 5. Declaration	129
—— §§ 9, 26. " "	250	—— § 69. Trial	182
c. 139, § 9. Guardian	510	—— § 85. Amendment	128
c. 142, § 22. " "	480	c. 169, § 70. Evidence	73
—— § 23. " "	481	c. 171, § 10. Execution	190
c. 143, §§ 5, 6. Probate Bond	401	—— § 51. " "	212
—— § 10. Executor and Administrator	230	c. 175. Forcible Entry and Detainer	186
c. 146, § 1. Divorce	362	c. 183, §§ 8, 30. Trustee Process	447
c. 147, § 11. Married Woman	214	—— § 38. " "	375
c. 151, § 1, cl. 11. Equity	213	c. 184, §§ 12, 18. Replevin	520
—— § 3. " "	214	c. 190. Mill	443
—— §§ 27, 33. " "	179	—— §§ 3, 17. " "	486
c. 153, § 5. Court	581	c. 191, § 6. Lien	82
c. 155, § 58. Appeal	458	c. 192, §§ 5, 6. Mortgage	521
c. 157, § 96. Insolvency	20	c. 196, § 1. Statute of Limitations	389
—— § 98. " "	518	c. 197, § 1. " "	14, 390
c. 159, § 61. Reporter of Decisions	87	—— §§ 6, 7. " "	14
c. 161, § 20. Writ	562	—— § 14. " "	386
—— § 24. Indorser of Writ	141	c. 198, § 19. Costs	420

## STREET RAILWAY.

See NEGLIGENCE, 2-4.

## SUPREME JUDICIAL COURT.

Before 1874, the statutes of the Commonwealth provided for the appointment of a reporter of the decisions of the Supreme Judicial Court, who was required to be sworn to the faithful performance of his duties. The manner in which the decisions were to be reported, and the time in which they were to be published, were also prescribed. He was paid a salary by the State, and given "the profits arising from the publication of his reports." By the St. of 1874, c. 43, the reporter was required to keep in a public office the written opinions of the court in all cases argued, until their publication in the reports, and also his dockets and copies of papers in such cases, and to "afford due facilities for their examination." By the St. of 1879, c. 280, the Secretary of the Commonwealth was directed to enter into a contract with A. for the publication of the reports, the statute

specifying the size, style, and form of the volume, obliging the publisher to sell at a certain price to the public in this State, and at a certain less price to the State, and to pay the reporter a salary. The statute further provided, that the reporter should not be required or allowed to publish the reports; and that the stereotype plates and copyright of the volumes published should be the property of A. *Held*, that A. had no right, under a contract entered into with the Commonwealth in pursuance of the statute, to the first publication of the opinions of the court; and that any one, although not a citizen of the State, had a right to require the reporter to allow copies of such opinions to be made for the purpose of publication. *Nash v. Lathrop*, 29.

See EQUITY, 13.

### SURETY.

See PRINCIPAL AND SURETY.

### TAX.

1. By the St. of 1868, c. 81, certain persons were incorporated as the "Massachusetts Society for the Prevention of Cruelty to Animals;" but the objects and purposes were not defined otherwise than by the title of the act. By the St. of 1868, c. 212, § 8, reenacted in the St. of 1869, c. 344, § 7, all fines collected upon the complaint or information of any officer or agent of the corporation under that statute are to be paid over to the corporation "in aid of the benevolent objects for which it was incorporated." The methods adopted by the corporation are the gratuitous dissemination of papers and essays, and the delivery of free lectures, setting forth the proper treatment of animals; the organization of societies whose members are pledged to the prevention of cruelty to animals; the employment of agents to aid in enforcing the laws upon the subject; and the erection and maintenance of a free hospital for homeless, neglected, diseased, or abused animals, where they may be kindly cared for or humanely disposed of. *Held*, that the corporation was a "benevolent" and "charitable" institution, within the Pub. Sts. c. 11, § 5, cl. 3, exempting the property of such institutions from taxation. *Massachusetts Society, &c. v. Boston*, 24.
2. A deed of a collector of taxes recited that "no person has appeared to discharge said tax," and that the collector "has demanded the same of S., the reported owner of said real estate;" but the deed did not state that fourteen days elapsed after the demand before advertising the premises for sale, or that the tax was not paid within fourteen days after the demand. *Held*, that, under the Gen. Sts. c. 12, §§ 22, 35, the deed was void. *Langdon v. Stewart*, 576.

See TENANT IN COMMON, 1; TRUST AND TRUSTEE, 5.

### TENANT IN COMMON.

1. A tenant in common of real estate may recover of his cotenant, under a count on an account annexed, one half of the amount paid for taxes assessed upon the estate. *Kites v. Church*, 586.

2. If a tenant in common of real-estate occupies the whole estate under an oral agreement to pay his cotenant for the occupation, the latter may recover for the same under a count on an account annexed, although his claim is described therein as for "rent." *Kües v. Church*, 586

## TENDER.

See INSURANCE, 5.

## TOWN.

At the trial of a complaint on the Pub. Sts. c. 91, § 27, for illegally fishing in a great pond, it appeared that a lease of the pond by the commissioners of inland fisheries had been made to the inhabitants of the town in which the pond was situated; that the lease was in possession of the town officers, and was recorded in the town records; and that there were repeated votes appropriating money to stock the pond with fish, choosing committees to stock the pond and other committees to look after the pond, receiving and acting on the reports of their fish committees, accepting the rules and regulations made by them for the use of the pond, changing the times of fishing therein, and directing their fish committee to apply for changes to the commissioners. *Held*, that these facts afforded ample evidence, as against the defendant, that the inhabitants were lawfully the lessees of the pond; although there was no formal vote of the town accepting the lease. *Commonwealth v. Richardson*, 71.

See ASSIGNMENT, 1; CONSTITUTIONAL LAW, 2; ESTOPPEL, 1; GRANT; TREE; WAY, 9-12.

## TREE.

In an action, brought in 1884, for cutting down shade trees, it appeared that they were planted by the plaintiff, in 1866 or 1867, in front of his house, and within the limits of the highway, the fee of which was in the town; and that the defendant was acting under authority from the selectmen of the town. *Held*, that the provision of the Pub. Sts. c. 54, § 6, relating to "shade trees standing," did not apply; and that there was no conclusive presumption of law that the plaintiff had a license to plant them. *Gaylord v. King*, 495.

## TRESPASS.

See ADVERSE POSSESSION; RAILROAD, 8.

## TRIAL.

See WITNESS.

## TROVER.

1. The heirs at law of a mortgagor of land cannot maintain trover against an assignee of the mortgage, in possession for breach of condition, before



foreclosure, for cutting and carrying away trees growing on the land. *Place v. Sawtell*, 477.

2. In an action against A. and B. for the conversion of certain goods, the plaintiff's evidence showed that A. was introduced to the plaintiff by B., who had previously bought goods of the plaintiff, as a person desirous of buying goods of the plaintiff on credit; that A. then signed, in B.'s presence, a written statement, showing his assets and liabilities, and B. also made to the plaintiff oral representations in regard to A.'s pecuniary responsibility; that the plaintiff, relying upon the statement and these representations, sold the goods in question to A. on a credit of thirty days; that B. was present during the sale, and assisted in the selection of the goods by A.; that a bill of parcels was made out to A., and the goods were shipped, according to A.'s directions, in a case marked with his name, to his place of business; that the plaintiff afterwards saw the goods exposed for sale, and the case in which they were shipped, unpacked, in B.'s shop; that, at the end of the thirty days, A. was unable, when called upon, to pay for the goods; and that B. refused, upon demand, to pay for them. *Held*, that there was no evidence of a conversion by A. and B., jointly or severally. *Bates v. Youngerman*, 121.

#### TRUST AND TRUSTEE.

1. A., by his will, provided that the executors thereof were to have full charge of his real estate, to lease the same and collect the rents, and, as soon as convenient and profitable, to sell and convey the same to any purchaser or purchasers, at public or private sale, without any order of court or license; with the power to "turn over and convey any part or parts of the same in discharge of any devises or bequests herein, . . . all as in their judgment may appear best." Afterwards A. executed a deed, by which he conveyed his real estate to three trustees, to have and to hold to them, "and their heirs and assigns forever, in trust nevertheless for the said A., with full power and authority to said trustees to manage said real estate as they may deem best, to lease, let, to sell and convey the same, or any part thereof, at public or private sale, and to execute and deliver a deed or deeds of the same." Subsequently, the testator made a codicil to his will, bestowing an additional legacy, and in all other respects confirming his will. After A.'s death, the trustees named in the deed conveyed the real estate to the executors of his will, "executors as aforesaid, their heirs, successors, and assigns, for their use and behoof forever." The executors made a contract with a person for the sale of a parcel of the real estate, and executed to him a quitclaim deed of the same, "by virtue of the power conferred upon us by said will, and of every other power us thereto enabling," which he refused to accept. *Held*, that the executors had power to convey a good title to the land, and could maintain a bill in equity for specific performance of the contract. *Chesman v. Cummings*, 65.
2. A trustee under a will filed an inventory in the Probate Court, in which certain shares of stock in a corporation were valued at a certain sum. Subsequently he wrongfully sold the shares, and converted the proceeds to

his own use. In an action against a surety on his bond, it appeared that the market value of the shares on the day the same were transferred on the books of the corporation was less than the valuation in the inventory; but it did not appear what the market value was on the day they were sold, or what amount the trustee received for them. *Held*, that the trustee could not object to being charged with the valuation in the inventory. *McKim v. Hibbard*, 422.

3. A trustee under a will, which gave him the power to sell and dispose of the trust estate, and to reinvest the proceeds, from time to time, as he should deem advisable, filed an inventory in the Probate Court, in which certain shares of stock in a corporation were valued at a certain sum. He then sold the shares for the purpose of converting them to his own use, and appropriated the proceeds. In his subsequent accounts he represented the shares as in his possession. *Held*, in an action on his bond, that a surety thereon could not object to being charged with the market value of the shares at the date of the writ, with all dividends declared thereon to that time. *Ib.*
4. A testator, by his will, gave certain property in trust for the benefit of two children; and provided that, during their minority, interest was to be added to the principal, and that, after that period, each child was entitled to the income of his portion, and, under certain circumstances, to the principal or a part thereof. When the elder child became of age, the trustee rendered an account of the property held by him for the benefit of both children, including accumulations to a certain amount; and, two years and a half afterwards, a settlement was made between the trustee and the elder child on the basis of this account, and the income of his proportionate share, with its proportionate accumulation, from the date of his majority to the date of the settlement, was paid to him, together with a certain sum out of his share of the principal as accumulated. In fact, the trustee had before these settlements wrongfully sold and appropriated all of the trust property. *Held*, in an action against a surety on the trustee's bond, that the surety was chargeable with interest upon the elder child's share of the principal, with its share of added accumulation from the date of his majority to the date of the writ; and that a rest was properly made as of the former date. *Held, also*, that the surety was chargeable with interest on the younger child's similar share from the date of the elder child's majority; and that a rest should be made at the date of the younger child's majority, which was before the date of the writ. *Ib.*
5. If a trustee misappropriates the trust property, and, in an action against a surety on his bond, the surety is charged with the full amount of the trust property to a period later than the misappropriation, a sum equal to commissions which the trustee would have earned if the estate had been properly administered should be deducted, and also the amount of taxes paid by the trustee, although they were paid to conceal his embezzlement. *Ib.*
6. If a trustee sells securities belonging to the trust estate, and converts the proceeds to his own use, in an action against a surety on his bond interest should be computed on the amount converted from the day it is found to

be due up to the day of issuing the execution, without making a rest at the date of the writ. *McKim v. Hibbard*, 422.

See BOND, 3; DEED, 1; DEVISE AND LEGACY; EQUITY, 6; GIFT, 1.

### TRUSTEE PROCESS.

In a trustee process, where there are successive services of the writ upon the trustee, under the Pub. Sta. c. 183, § 8, and the action is on a demand for necessities, the trustee is entitled, under § 80, to reserve from the amount due the defendant for personal labor the sum of ten dollars at the time of each service. *Hall v. Hartwell*, 447.

See GIFT, 2.

### USAGE.

See AUDITOR, 1; CONSIGNOR AND CONSIGNEE; EVIDENCE, 5.

### USE AND OCCUPATION.

See EVIDENCE, 13; TENANT IN COMMON, 2.

### VARIANCE.

See FALSE PRETENCES, 1, 3, 4; GUARANTY, 2.

### VESTED REMAINDER.

See DEED, 1.

### VOTE.

See GIFT, 2; TOWN.

### VOTER.

See CONSTITUTIONAL LAW, 2, 3.

### WAIVER.

See DEPOSITION; EQUITY, 14; GUARDIAN AND WARD, 2; INSURANCE, 2; MILL, 2.

### WAREHOUSEMAN.

In an action of contract against a warehouseman, for a failure to keep safely goods entrusted to him, if it appears that the goods were returned in a damaged condition, and that the damage was caused by the fall of the warehouse, the burden of proof is on the plaintiff to show that such damage was caused by the negligence of the defendant or his servants. *Willett v. Rich*, 356.

## WATER AND WATERWORKS.

See ACTION, 2; CITY, 1; CONSTITUTIONAL LAW, 4; EVIDENCE, 6, 7, 14; EXCEPTIONS, 8; STATUTE, 1.

## WATERCOURSE.

Mere surface drainage over one tract of land to another, through a ditch, does not constitute a watercourse. *Stanchfield v. Newton*, 110.

See ACTION, 6.

## WAY.

1. At the trial of a petition for the assessment of damages occasioned to land by the discontinuance of a portion of a street, the petitioner contended that he had acquired by prescription a right of way over a passageway throughout its entire length from said street to a parallel street. The judge refused to rule, as requested by the respondent, that, in estimating the damages, "no part of the discontinued portion of said street except that on which said passageway abutted should be taken into account." *Held*, that the respondent had no ground of exception. *Webster v. Lowell*, 324.
2. At the trial of a petition for the assessment of damages occasioned to land by the discontinuance of a portion of H. Street, there was evidence of the existence of a passageway from H. Street to T. Street, a parallel street; that the petitioner's land abutted on H. Street and on a portion of the passageway; and that gates and other barriers at different times had been erected across the passageway at places between the two streets, or at the T. Street end; but no witness testified that any gate or other barrier had ever been placed in that part of the passageway between H. Street and the rear of the petitioner's premises, or that his use of the way had ever been interrupted. The judge instructed the jury, that, if they found that the petitioner, as the owner of the land, had acquired a right of way to and from H. Street over the land which abutted upon the discontinued portion of H. Street, "it was immaterial whether he had a right to pass to and from T. Street or not." *Held*, that the respondent had no ground of exception. *Ib.*
3. At the trial of a petition for the assessment of damages occasioned to land by the discontinuance of a portion of a street, the petitioner contended that he had acquired by prescription a right of way over a passageway leading from said street to a parallel street. There was evidence of an open and adverse use of the way under a claim of right for more than twenty years by the owners of the land described in the petition; and there was evidence for the respondent that the owners of the servient estate had from time to time interrupted the use of the way by the petitioner and his predecessors in title. After the evidence on both sides was closed, the respondent asked the judge to rule that there was not sufficient evidence to warrant the petitioner in going to the jury. *Held*, that this request was rightly refused. *Ib.*

4. A petition for the assessment of damages occasioned to land by the discontinuance of a portion of H. Street alleged that the land was situated on the northeasterly side of H. Street in a certain city, (describing it by metes and bounds,) "together with a passageway upon the northerly side of the premises." At the trial, the petitioner contended that he had acquired by prescription a right of way over a passageway throughout its entire length from H. Street to a parallel street. *Held*, that proof of a right of way only to and from H. Street was not inconsistent with the allegation in the petition. *Webster v. Lowell*, 324.
5. If a private way is laid out for the use of the tenants of an estate abutting thereon, the owner of another estate also abutting thereon may acquire a right of way therein by adverse use, although his use is of the same character as that of said tenants, and does not interfere with their use. *Ib.*
6. On the issue whether a right of way had been acquired by the petitioner by adverse use, the respondent requested the judge to rule, that, if the way was laid out for the benefit of an estate other than that of the petitioner, and was used by the tenants of such estate, and by those having dealings with them, and was also so used continuously, with the knowledge and consent of the owner, by all persons having occasion to pass through the same, including the petitioner, the petitioner could not acquire a right of way over the same by adverse use. The judge said that, if by the terms "knowledge and consent" was meant an express consent or permission, as distinguished from a silent acquiescence in or failure to object to an asserted right by the petitioner, the court would grant the request; otherwise, it would be refused. *Held*, that the respondent had no ground of exception. *Ib.*
7. If the owner of land abutting on a street in a city has acquired a right of way by adverse use over a strip of land at the side of his lot, which extends to the street, he may maintain a petition against the city for the assessment of damages occasioned by the discontinuing of the street opposite such strip of land, although the owner of such strip owns the fee in the part of the street which is discontinued. *Ib.*
8. In an action against a city for personal injuries occasioned by a defect in a highway, the evidence showed that the defect was a ridge of ice extending over the sidewalk from the outlet of a water conductor upon a building adjacent to the sidewalk, which emptied its water upon the sidewalk, and which had been there for a long time. The judge instructed the jury that they might take into consideration the existence of the conductor, in connection with the time the defect had existed, as bearing upon the question whether the city had notice, or might have had notice, of the defect by the exercise of proper care and diligence. *Held*, that the defendant had no ground of exception. *Olson v. Worcester*, 536.
9. In an action against a town for an injury occasioned by an alleged defect in a highway, in the night-time, the plaintiff, a woman, testified that she was in a vehicle with her husband, and he was driving slowly. The husband testified that the night was dark and foggy; that he had a rein in each hand, was holding the reins tightly, and was driving down a hill as slowly as the horse could trot. There was other evidence indicating a

greater rate of speed. *Held*, that the question whether the plaintiff and her husband were in the exercise of due care was properly submitted to the jury. *Flagg v. Hudson*, 280.

10. If a person, driving along a narrow highway in a town, on a dark and foggy night, and using due care, turns his horse to the left, in order to avoid going down an embankment on the right of the road, which is not guarded by a railing, and comes into collision with a carriage approaching from the opposite direction, and which is on its proper side of the middle of the way, and is injured, the defect is the sole cause of the injury, and he may maintain an action therefor against the town. *Ib.*
11. A notice to a town, by a person who has been injured by a defect in a way, stating that, "since falling on the sidewalk in front of the Button shop" on a day named, "I have been unable to work," and "request a settlement," sufficiently designates the cause of the injury, under the Pub. Sts. c. 52, § 19, as amended by the St. of 1882, c. 36. *Fortin v. Easthampton*, 486.
12. In an action against a town for personal injuries occasioned by a defect in a way, evidence of a conversation between the plaintiff, who has given a written notice to the town, and a selectman, in which conversation the latter is informed of the time, place, and cause of the accident, is admissible, for the purpose of showing that the town was not misled by the notice, within the St. of 1882, c. 36. *Ib.*

See CITY, 3-5; DEED, 2, 8; EQUITY, 7; ESTOPPEL, 1; EVIDENCE, 8; GRANT; INFORMATION, 1; RAILROAD, 2, 5.

#### WILL.

1. A widow, with three children, whose only property was derived from her deceased husband, contemplating a second marriage, made a will, by which she bequeathed all her property received from her first husband to her three children. Her intended husband knew the contents of the will, and orally assented to its execution. The widow then married, and had a child by her second husband. *Held*, that the will was thereby revoked. *Nutt v. Norton*, 242.
2. A testator executed three wills, each containing a revocatory clause, and each of which he published and declared to be his last will. At the time he executed the third will, he said he would keep them all until he made up his mind which he wanted to keep, and would then destroy the two he did not want. He afterwards destroyed the first and third wills. *Held*, that these facts would warrant a finding, that the testator, in cancelling the third will, intended to revive the second will, without further evidence of a republication of this will. *Williams v. Williams*, 515.

See DEVISE AND LEGACY.

#### WITNESS.

In a criminal case, when the witnesses for the government were about to be sworn, the defendant objected to the oath being administered to one of

them, a girl thirteen years old, on the ground that she was ignorant of the nature and obligation of an oath. The girl said that she understood that the oath was to tell the truth, and that she would be punished if she did not tell the truth after taking it, but that she did not know how or by whom she would be punished. The judge said he would postpone the decision of her competency, and she could be instructed, if necessary. The next day she was offered as a witness, and was found competent and permitted to testify, against the exception of the defendant. It appeared that, after the adjournment of the court the first day, she was instructed by a Christian minister, who told her that God would punish her, if, after taking the oath, she testified what was not true; and that she did not know this before. *Held*, that a bill of exceptions, taken by the defendant, and setting forth these facts, showed no ground of exception. *Commonwealth v. Lynes*, 577.

### WORDS.

- "Administrative." See *Attorney General v. Boston*, 200, 204.
- "Benevolent." See *Massachusetts Society, &c. v. Boston*, 24, 27.
- "Charitable." See *Massachusetts Society, &c. v. Boston*, 24, 27.
- "Executive." See *Attorney General v. Boston*, 200, 204.
- "Heir." See *Elsey v. Odd Fellows' Relief Association*, 224, 226.
- "Pending." See *Andrews v. Cassidy*, 96.
- "Pice." See *Cheney Bigelow Wire Works v. Sorrell*, 442.
- "Place." See *Commonwealth v. Jones*, 573, 575.
- "Rent." See *Kites v. Church*, 586, 589.
- "Spring." See *Peck v. Clark*, 436, 440.
- "Watercourse." See *Stanchfield v. Newton*, 110, 116.

### WRIT.

The writ in an action by a seaman described the defendants by the fictitious names of "John Doe and Richard Roe, owners" of a certain vessel. The vessel was attached, and the writ was served on the master of the vessel, who gave bond with sureties to release the vessel from attachment. No change in ownership occurred while the vessel was on the voyage during which the cause of action arose, up to the time of the attachment. An appearance by counsel was entered for the defendants, and an answer filed. At the trial, the judge was asked to rule that the plaintiff must show the ownership of the vessel by the defendants, as alleged in the writ. *Held*, that the ruling requested was rightly refused. *Baxter v. Doe*, 558.

See JUDGMENT; SCIRE FACIAS.

### WRIT OF ENTRY.

See ESTOPPEL, 2; GUARDIAN AND WARD, 2; JUDGMENT; MORTGAGE, 1, 2.

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